No. 93-1078

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. To what extent, if any, must a court defer to a *legislative* finding that a measure which substantially impairs a labor contract between a local government and its own employees is "necessary and reasonable" under the Contract Clause of the United States Constitution?

2. May a local government substantially impair a labor contract that it holds with its own employees by cutting employee wages when other fiscal policies would not require the local government to impair that contract right?

3. Must an action taken by a local government which impairs a contract right be sanctioned by a *legislative* measure in order to survive attack under the Contract Clause of the United States Constitution?

LIST OF PARTIES TO PROCEEDINGS BELOW

This matter originated in three separate cases that were consolidated by order of the Court of Appeals. None of the parties is a private business entity. The parties and style of each case in the Court of Appeals were as follows:

U.S.C.A. No. 92-2234-

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO; THE CITY UNION OF BALTIMORE, AMERICAN FEDERATION OF TEACHERS, LOCAL 800, AFL-CIO,

Plaintiffs-Appellees,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, Individually and in his capacity as Mayor and Member of the Board of Estimates of Baltimore City; MARY PAT CLARKE, Individually and in her capacity as President of the Baltimore City Council and Member of the Board of Estimates of Baltimore City; JACQUELINE F. MCLEAN, Individually and in her capacity as Comptroller and Member of the Board of Estimates of Baltimore City; NEAL JANEY, In his capacity as Member of the Board of Estimates of Baltimore City; GEORGE F. BALOG, Individually and in his capacity as Member of the Board of Estimates of Baltimore City; BOARD OF ESTIMATES OF BALTIMORE CITY

Defendants-Appellants.

U.S.C.A. No. 92-2237-

In Re: STATE OF MARYLAND,

Appellant,

v.

Same parties as in U.S.C.A. No. 92-2234(L)

U.S.C.A. No. 92-2238-

BALTIMORE CITY LODGE NUMBER 3
FRATERNAL ORDER OF POLICY,

Plaintiff-Appellee,

v.

MAYOR AND CITY COUNCIL OF
BALTIMORE,

Defendant-Appellant.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

BALTIMORE TEACHERS UNION,
AMERICAN FEDERATION OF TEACHERS
LOCAL 340, AFL-CIO,

and

CITY UNION OF BALTIMORE,
AMERICAN FEDERATION OF TEACHERS,
LOCAL 800, AFL-CIO,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
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Respondents.

PETITION FOR WRIT OF CERTIORARI

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Baltimore Teachers Union, American Federation of

Teachers Local 340, AFL-CIO and City Union of Baltimore, American Federation of Teachers, Local 800, AFL-CIO, petitioners, by their undersigned counsel, respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit that was entered in this matter on September 2, 1993, in which a majority of a three member panel of the Court of Appeals held that Baltimore City's 1992 employee pay cut was a substantial impairment of contract but is permitted by the Contract Clause, U.S. Const., art. I, sec. 10, cl. 1.

OPINIONS BELOW

There are three opinions in this matter. All are published.

1. The District Court's published opinion is dated September 18, 1992, and is reported as Baltimore City Lodge No. 3, Fraternal Order of Police v. Mayor and City Council of Baltimore, 801 F.Supp. 1506 (D. Md. 1992). The slip opinion is reproduced at App. 1.

2. The Fourth Circuit's published panel opinion is reported as Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v. Mayor and City Council of Baltimore, 6 F.3d 1012 (4th Cir. 1993). The majority panel opinion is reproduced at App. 23 - App. 58 The concurring panel opinion is reproduced at App. 58 - App. 71.

3. The Court denied without opinion the AFT Unions' petition for rehearing and suggestion for rehearing *in banc* on October 8, 1993. App. 72 - App. 76. An amended order on the petition for rehearing and suggestion for rehearing *in banc* and a dissenting opinion from denial of petition for rehearing *in banc* were issued by the Court on October 12, 1993 and are reported at 144 LRRM (BNA) 2518, and 1993 WL 406566. They appear at App. 77 - App. 89.

JURISDICTION OF THIS COURT

The final judgment of the United States Court of Appeals for the Fourth Circuit for which petitioners seek review was entered on September 2, 1993. Petitioners

Baltimore Teachers Union and City Union of Baltimore timely filed a petition for rehearing and a suggestion for rehearing *in banc* with the Court of Appeals. The petition for rehearing and suggestion for rehearing *in banc* were at first denied on October 8, 1993, and subsequently were again denied by an amended order that was entered on October 12, 1993. This petition has been filed as required by Rule 13 of the Rules of this Court. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under Rule 13 of this Court and under 28 U.S.C. Sec. 1254(1) (1991).

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, Sec. 10, cl. 1

"No State shall ... pass any ... Law impairing the Obligation of Contracts ..."

STATEMENT OF THE CASE

This is a Contract Clause action. The labor unions of

16,000 Baltimore City employees challenge a pay cut.[1] The district court held that the Mayor and City Council of Baltimore violated the Contract Clause, U.S. Constitution, art. I, Sec. 10, cl. 1, when the City's Board of Estimates adopted a pay cut as a wage "furlough" on January 16, 1992. The district court directed the City to restore to the plaintiff unions for the benefit of their members all wages withheld under the pay cut. App. 22.

Under the pay cut, "full-time city employees ... lost the

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[1] The plaintiff parties in U.S.C.A. No. 92-2234 were the Baltimore Teachers Union and the City Union of Baltimore which both are affiliates of the American Federation of Teachers. The AFT Unions represent certificated teachers, public school professional, administrative and clerical employees, and other white collar City employees throughout the agencies and bureaus of City government. The Fraternal Order of Police, plaintiff in U.S.C.A. No. 92-2238, represents police officers and uniformed supervisors. The State of Maryland applied to intervene in the AFT's action. The district court denied intervention. The State appealed. U.S.C.A. No. 92-2237 is the appeal filed by the State of Maryland as a disappointed applicant for intervention in the suit filed by the AFT unions. The Court of Appeals declined to reach the intervention issue as moot. App. 57, n. 14.

annual equivalent of 2.5 days of pay, or .95% of their gross annual salary, and Baltimore saved approximately $2.0 million, which it does not intend to refund." App. 28. The sum recovered by the City amounted to but .001% of the City's $2.0 billion dollar budget for Fiscal Year 1992. The district court held that the pay cut was not necessary or reasonable to avert a fiscal crisis:

> The City could have shifted the burden from another governmental program, or it could have raised taxes; an option the Court recognizes would not have been popular among politician-legislators. But the contract clause exists exactly for that reason, as a constitutional check on governmental legislation.

App. 17.

The action was heard on appeal by the United States Court of Appeals for the Fourth Circuit. The Court of Appeals shifted the fiscal burden back to the City's employees. The opinion filed by the panel presents in the words of one member of the United States Court of Appeals for the Fourth Circuit "[a] conflict of circuits ... on an item of potentially

immense importance." App. 88 - App. 89. Another federal judge has written of the decision below: "... it is fair to say that this Court -- giving all due respect to the United States Court of Appeals for the Fourth Circuit -- believes that the Supreme Court should grant a writ of certiorari in [the] case and issue a definitive decision different from that reached by the Fourth Circuit." App. 136.[2]

The wages of the City's employees are defined in

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[2] Baltimore City is not the only political subdivision of the State of Maryland in which employee wages were cut in 1992. On October 18, 1991, Maryland's General Assembly first enacted what is popularly known as the Neall Amendment. *See* Budget Reconciliation Act for Fiscal Year 1992, sec. 9(a) 1991 Md. Laws (Spec. Sess.) ch. 3. App. 100 - App. 101. The Amendment authorized the State's twenty-four subdivisions and all local boards of education to "take any action necessary, including any action to reduce a previously approved appropriation, to prudently manage its fiscal affairs..." App. 101. The panel majority held that if read to "authorize any contravention of contractual terms" the Neall Amendment "would almost certainly violate the Contract Clause itself." App. 36, n. 5. The 1992 recession and the Neall Amendment spawned a number of other court actions filed in Maryland by other organizations. *See, e.g.*, App. 104 - App. 138.

written labor agreements between the City and its unions.[3] The labor agreements are adopted once each fiscal year when the City prepares its annual operating budget. The terms of the agreements are incorporated into the City's annual Ordinance of Estimates. After the Ordinance is enacted into law, the agreements stand as binding contract obligations of the City for the duration of the fiscal year. *See* Mayor and City Council v. American Federation of State, County and Municipal Employees, 281 Md. 463, 379 A.2d 1031 (1977).[4]

The district court and a majority of the panel which decided the case in the Court of Appeals held: (1) that the

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[3] The bargaining rights of City employees are defined under the City's Charter and its Municipal Employee Relations Ordinance (MERO). Teachers enjoy bargaining rights under State law. *See generally* Md. Educ. Code Ann. Sec. 6-410. The panel majority held that the budget process under MERO and for public school teachers is largely the same. App. 27.

[4] *Compare with* Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 107 (1938) and Phelps v. Board of Education of West New York, 300 U.S. 319, 323 (1937).

labor unions' fiscal year 1992 agreements with the City were binding as contracts (App. 32); (2) that the contracts were impaired by the pay cut adopted within the 1992 fiscal year by the City's Board of Estimates on January 16, 1992 (App. 34 - App. 35); and, (3) that the contracts were substantially impaired. App. 41 - App. 42.[5] The panel majority stated in its opinion, "[i]n the employment context, there likely is no right both more central to the contract's inducement and on the existence of which the parties more especially rely, than the right to compensation at the contractually specified level." App. 41.

The three member panel of the Fourth Circuit reversed the judgment of the district court on September 2, 1993. The panel majority found that the sacrifice imposed by the pay cut was to be expected of public servants. The majority concluded

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[5] *See* General Motors Corp. v. Romein, --- U.S. ---, ---, 112 S.Ct. 1105, 1109 (1992) ("Generally, we first ask whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'").

that the pay cut was appropriate to its purpose, which was to balance the City's budget. App. 48 - App. 49. The panel's decision placed the Circuit at odds with other courts on the balance that is to be struck under the Contract Clause. *See infra* pp. 22 - 28.

On October 12, 1993, the Court of Appeals denied a petition for rehearing and suggestion for rehearing *in banc* under F.R.A.P. Rules 35 & 40, from which Circuit Judge Francis D. Murnaghan, Jr. dissented. Judge Murnaghan termed the City's wage cut "an improper abdication of the responsibility to see that the federal constitution is complied with." App. 85. Contrary to the panel's view, Judge Murnaghan wrote: "To avoid what politics would have rendered unpopular, Baltimore City chose to ignore, that is to break, contracts and thereby to interfere quite unfavorably with the bargained rights, namely the livelihood of important city workers, the police and public school teachers." App. 86.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Petitioners contest a pay cut imposed by the City on January 16, 1992. The actions raise claims under 28 U.S.C. Secs. 1331 and 1343(3), and under the Civil Rights Act of 1871, 42 U.S.C. Secs. 1983, 1985 and 1988. The unions challenged the pay reduction under United States Constitution, art. I, Sec. 10, cl. 10. Baltimore Teachers Union and City Union Baltimore also joined State law claims under 28 U.S.C. Sec. 1367. The unions asked for declaratory relief on their claims under 28 U.S.C. Sec. 2201.[6] The district court entered judgment on September 21, 1992. The court's order was a final judgment. Review by the Court of Appeals was

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[6] The AFT's State law claims were not determined by the district court or the Court of Appeals. Consequently, the Court of Appeals reversed and remanded the action for further proceedings. App. 57 n. 14. The AFT Unions intend to waive their right to proceed on the state law claims in federal court, and thus shall seek no further relief in the district court. The Court of Appeals' decision absent review by this Court shall be the final judgment in the action.

appropriate under 28 U.S.C. Sec. 1291. *See* Catlin v. United States, 324 U.S. 229, 233 (1945).

ARGUMENT FOR GRANT OF THE WRIT

1

THE COURT SHOULD GRANT A WRIT OF *CERTIORARI* IN ORDER TO DEFINE WHAT DEGREE OF DEFERENCE, IF ANY, A COURT MUST AFFORD TO A LEGISLATIVE MEASURE WHICH IMPAIRS A LABOR CONTRACT BETWEEN A LOCAL GOVERNMENT AND ITS OWN EMPLOYEES.

Federal and State courts have applied the test adopted in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) to wage disputes between local governments and public employees. The courts below have acknowledged that this Court has not stated in specific terms what depth of review a court must employ in a Contract Clause action when a contract between a government and its employees is substantially impaired. The courts are divided over the proper method of review.

The district court below held, "[a]lternatives always exist to

imposing the costs of budgetary shortfalls on ... City employees." App. 17. The panel majority of the Court of Appeals disagreed. It wrote instead, "[i]t should not be wholly unexpected ... that public servants might well be called upon to sacrifice first when the public interest demands sacrifice." App. 54.

The conflict between local government and public employee interests is not unique to Baltimore, or even to Maryland. It also has appeared within the past year in the District of Columbia[7] and the Commonwealth of Virginia. The conflict recently has been addressed by other courts but with a result quite opposite to that reached by the panel. There are recent reported decisions on the same issue from Florida,[8]

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[7] District of Columbia v. American Federation of Government Employees, 619 A.2d 77 (D.C. App. 1993).

[8] Lawton Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993).

New Hampshire,[9] Iowa,[10] and New York.[11] Each is **contrary** to the decision of the Fourth Circuit.

The Contract Clause, U.S. Const., art. I, sec. 10, cl. 1, applies both to contracts to which government is a party and to private contracts. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137 (1810)("The words ... are applicable to contracts of every description."). The federal courts have struggled with the contract obligations of state and local governments, particularly in times of fiscal crisis. The issue first arose early in the history of this Court. In Trustees of Dartmouth College v. Woodward, Justice Story wrote:

> ... when the legislature makes a contract with a public officer, as in the case of a stipulated

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[9] Opinion of the Justices, 135 N.H. 625, 636, 609 A.2d 1204, 1211 (N.H. 1992).

[10] AFSCME/Iowa Council 61 v. State, 484 N.W.2d 390, 394 (1992).

[11] Association of Surrogates and Supreme Court Reporters v. State of New York, 940 F.2d 766, 772 (2nd Cir. 1991), *cert. denied* 112 S.Ct. 936 (1992). *See also infra* at pp. 23 - 24.

> salary for his services during a limited period, this, during the limited period, is just as much a contract within the purview of the constitutional prohibition, as a like contract would be between two private citizens.

17 U.S. (4 Wheat.) 518, 694 (1819).

In Hall v. Wisconsin, 103 U.S. (13 Otto) 5, 10 (1880), the Court found no difference to exist between the interests of parties who contract to provide goods or services to government and those who are employed by government. "It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights." *See also* Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 416 (1850).[12]

The Court has stated in its more recent opinions,

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[12] *But compare with* Stone v. Mississippi, 101 U.S. (11 Otto) 814, 821 (1879) as to a public charter or license which is "subject to future legislative and constitutional control or withdrawal."

"[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412, n. 14 (1983). Further, "[a] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." United States Trust Co. v. New Jersey, 431 U.S. at 30-31.

The Contract Clause is "not to be read with literal exactness like a mathematical formula." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934). "If the state regulation constitutes a substantial impairment [of contract], the State, in justification, must have a significant and legitimate public purpose behind the regulation[.]" Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983). Because a government's "self-interest is at stake" its obligations assume a "special status" which must be more scrupulously examined. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, n. 15 (1978). The question

posed here is **how** such an examination must be conducted.

The panel majority held that a court must balance the Contract Clause against the power reserved by a government to protect the public welfare. App. 43. *See also* United States Trust, 431 U.S. at 21. The majority acknowledged, however, that the method by which a conflict between private contract rights and the public interest must be weighed is not clearly defined in the decisions of this Court. "The Court has never expressly stated that any deference is owed legislative judgements in the context of public contract impairment." App. 45 - App. 46 at n. 10. Indeed, the panel observed "... the Court has never specified what it intends by the requirement of a more searching examination ... for the impairment." App. 46 at n. 10.

The panel majority concluded that the City of Baltimore did not violate the Contract Clause. It deferred to the pay cut as a legislative act of the City. "[A]ffording the requisite degree of deference to the City's legislature ... the impairment

was in exercise of the City's legitimate powers and thus permissible under the Contract Clause." App. 32. The majority approved of the City's action because "[t]he Contract Clause ... does not require the courts ... to sit as superlegislatures...." App. 55. Yet, that rule properly applies only where the government is not a party to a contract that is impaired.

When the contract is between private parties the appropriate role for a court, "[a]s is customary in reviewing economic and social regulation, ... [is to] defer to legislative judgment as to the necessity and reasonableness of a particular measure." Energy Reserves Group v. Kansas Power & Light, 459 U.S. at 412-13 *quoting from* United States Trust Co., 431 U.S., at 22-23. *See also* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 505 (1987).

When government is a party to a contract greater scrutiny is demanded. United States Trust Co., 431 at 30-31. In Murray v. Charleston, 96 U.S. 432, 448 (1877), the Court

held that "no municipality of a State can, by its own ordinances ... relieve itself from performing to the letter all that it has expressly promised to its creditors."

There is a difference between mere rational basis review and a higher degree of scrutiny. The Court adopted a higher standard of review in United States Trust. *See* 431 U.S. at 60-61 (Brennan, J., dissenting). When the standard of review exceeds simple deference to a legislative action, that is, whether an action has any rational basis at all, the Court has refused to accept the supposed goals of a government measure without more critical review. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648, at n. 16 (1975) ("This Court need not ... accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."); and City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) ("the mere recitation of a 'benign' or legitimate purpose ... is entitled to little or no

weight.").

Baltimore City's action must be "reasonable and necessary" to survive constitutional review. The panel majority permitted the action because it was *legislative* in character. The panel deferred to what it believed was the *legislative judgment* of the City's Board of Estimates. It accepted at face value the City's assertion that there was no other, preferred alternative to a pay cut. *Compare with* Lyng v. Castillo, 477 U.S. 635, 637-39 (1986) *and* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

When there must be more than a simple rational basis review on a constitutional question, a court is not ineluctably bound by the actions of other branches of government. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 103 (1973). In fact, "where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity." Whitney v. California, 274 U.S. 357, 374

(1927). (Brandeis, J., concurring).

The district court correctly observed that political self interest brought about the City's actions. *See e.g.* App. 85 - App. 86; App. 125 - App. 126 n. 7. The City considered an employee pay cut to be on a par with other policy choices. In fact, the City found a pay cut the more expedient choice in the public eye. The pay cut was politically more desirable than other choices that were available -- reduction of services, increased taxes, or deferral of other expenses -- because it imposed a burden only on the City's employees. *See* App. 125 - App. 126 n. 7. A writ of *certiorari* ought to be granted to define the standard against which such policy choices are to be measured by the courts when they are asked to consider whether an impairment is "necessary and reasonable" under the Contract Clause.

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THE OPINION OF THE PANEL MAJORITY REVEALS A CONFLICT BETWEEN THE CIRCUITS, AND BETWEEN THE FOURTH CIRCUIT AND SIX STATE COURTS OF LAST RESORT, ON AN IMPORTANT QUESTION OF PUBLIC FISCAL POLICY

While the majority deferred to the City's *legislative* judgment other courts have not followed the same path.[13] The majority opinion of the panel conflicts with settled authority in at least one other federal circuit court of appeal, and with the reported decisions of six of the highest State courts of appeal. The panel's opinion is contrary to what was

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[13] The 1992 pay cut was adopted without any *legislative* action. The pay cut began in a most informal fashion, and was later abandoned without any action by the City's Board of Estimates. *See* App. 34 - App. 35, n. 4. The City's action therefore could not be accorded *legislative* deference. *See in banc* dissent, Murnaghan, J. App. 84 - App. 85. Review by *certiorari* shall afford the Court an opportunity to determine what *legislative* findings must be made by a local government, and in what form they must be made to pass constitutional scrutiny under the Contract Clause. *See* City of Richmond v. J.A. Croson Co., 488 U.S. at 500.

a settled and growing line of authority. *See* Rule 10.1.(a) and Rockford Life Ins. Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987). Further, the issues presented are a matter of strong public interest and definitive review shall benefit not only the parties to this appeal but others in Maryland and in other regions of the Nation.

The reported decisions which stand in direct conflict with the majority's opinion are as follows:

1. In Association of Surrogates and Supreme Court Reporters v. State of New York, 940 F.2d 766 (2nd Cir. 1991), *cert. denied* 112 S.Ct. 936 (1992) (Surrogates I) the United States Court of Appeals for the Second Circuit dismissed the view that public employees must sacrifice first for the benefit of the public good:

> ... it would be inconsistent for us to accept the defendants' argument that this impairment was necessary because of government fiscal crisis, and to do so by disregarding the personal fiscal crises that the lag payroll would create.

940 F.2d at 772.

The panel majority below applied an opposing presumption. It preferred what it saw as the public good to the detriment of public employee contract rights. The majority imposed a greater burden on the City's employees despite their contracts with the City: "It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice." App. 54.

2. Three reported opinions immediately followed Surrogates I with the same result: Association of Surrogates and Supreme Court Reporters v. State of New York, 78 N.Y.2d 143, 573 N.Y.S.2d 19, 577 N.E.2d 10 (N.Y. 1991), (Surrogates II); Association of Surrogates and Supreme Court Reporters v. State of New York, 577 N.Y.S.2d 386, 388 (N.Y. App. Div. 1991); and Association of Surrogates and Supreme Court Reporters v. State of New York, 79 N.Y.2d 39, 580 N.Y.S.2d 153, 156, 588 N.E.2d 51, 54 (N.Y. Ct. App. 1992).

3. In 1991, New York's State Assembly enacted another lag payroll plan to bridge a budget gap of $1.081 billion at the end of fiscal year 1991. The Second Circuit again refused to sanction "forced loans to the State from its employees." Condell v. Bress, 983 F.2d 415, 418-419 (2d Cir. 1993), *cert. denied* 113 S.Ct. 1849 (1993). The Court held that a "much worse" fiscal crisis would be necessary to justify seizing public employee wages. Contrary to Condell v. Bress, the panel majority in this matter found "[t]he public purpose justifying an impairment of contract need not be 'an emergency or temporary situation.'" App. 48 at n. 11.

4. The district court below held, "[o]nce a fiscal year has begun, an employee has every reason to expect that the wage rates fixed for that year will remain constant through out the year." App. 10. The panel majority held that the City's impairment of employee contract rights was substantial. App. 36 - App. 42.

While the Fourth Circuit panel considered the City's

fiscal needs, it virtually ignored the opposite side of the slate, that of the City's employees. Baltimore was far from impecunious, and nowhere near insolvent. Instead, the City struck upon the constituency least able to complain about additional wage taxes -- its employees -- to generate modest additional revenues to balance its budget. The panel majority absolved the City from any error. Other courts would have not:

> It would be no favor to the State to exonerate it from contractual liability. To do so would seriously impair its ability to function. A government must finance its affairs ... It would lead to untenable results if a government, after having contracted for needed things, did not have to pay for them.

AFSCME/Iowa Council 61 v. State, 484 N.W. 2d 390, 394 (Iowa, 1992). *Accord* Carlstrom v. State, 103 Wash.2d 391, 396, 694 P.2d 1, 5 (Wash. 1985)("Financial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts"); State of Nevada Employees Ass'n, Inc. v. Keating, 903 F.2d 1223, 1228 (9th

Cir. 1990) ("Nevada should not have interfered with the refund right of public employees when it was looking for ways to fund an increase in post-retirement benefits."); and Opinion of the Justices, 609 A.2d 1204, 1211 (1992) ("... the State cannot resort to contract violations to solve its financial problems.").

5. Petitioners suggested to the panel that the City must first exhaust all other reasonable means before it impaired their labor contracts. The unions argued that the means selected by the City to balance its budget must be ***the only means available***. *See* United States Trust Co., 431 U.S. at 30-31 ("[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives."). The panel majority rejected that view. App. 56 - App. 57.

In 1992, the Florida legislature struck a three per cent wage increase that was extended to public employees through collective bargaining. In Chiles v. United Faculty of Florida, the Florida Supreme Court found the legislature's action

contrary to the Contract Clause because funds may have been available from other sources:

> ... the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. **Rather, the legislature must demonstrate that the funds are available from no other possible reasonable source.** *Accord* United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977); Association of Surrogates and Supreme Court Reporters v. New York, 940 F.2d 766 (2d Cir. 1991); Sonoma County Organization of Public Employees v. County of Sonoma, 591 P.2d 1 (Cal. 1979). That has not happened here.

615 So.2d 671, 673 (Fla. 1993)(emphasis added).

CONCLUSION

The issues presented in this appeal are of broad public significance. They bear directly on the relationship between state and local governments and public employees. The panel majority opinion suffers from three principal defects:

First, while it concedes that a court has no benchmark

by which to measure what is "necessary and reasonable" the panel majority rests its decision on the premise that a wide berth of deference must be given a *legislative* action by state or local government. This Court has demanded far more careful scrutiny under the Contract Clause when the contract that is substantially impaired is one to which government is a party.

Second, the panel majority sustains the City's furlough in the view that it was a *legislative* action. However, as even the majority noted, the record facts "belie the suggestion that an appropriation reduction ever occurred." App. 36 at n. 4. Thus, review shall permit the Court to decide what *legislative* actions must be taken, and in what way they must be supported to stand scrutiny under the Contract Clause.

Third, the majority also departs from significant case doctrine recently adopted in other federal and state jurisdictions. Other courts would not impose a fiscal burden on public employees simply because they work for the

government. The other courts required the legislature to demonstrate that needed funds were not available from another source. Review shall settle a conflict in authority on an important public question.

Accordingly, with respect, the petitioners request that this Court issue a writ of *certiorari* to review the judgment of the Court of Appeals, as to which the Court of Appeals also denied *in banc* review.

Respectfully submitted,

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Dated:

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BALTIMORE CITY LODGE NO. 3 FRATERNAL ORDER OF POLICE	*	
v.	*	Civil No. Y-92-228
MAYOR AND CITY COUNCIL OF BALTIMORE CITY	*	
BALTIMORE TEACHERS UNION, et. al.	*	
v.	*	Civil No. Y-92-440
MAYOR AND CITY COUNCIL OF BALTIMORE, et. al.	*	

Michael Marshall, Esquire, Baltimore, Maryland, and Herbert R. Weiner, Esquire, Baltimore, Maryland, counsel for plaintiff Baltimore City Lodge No. 3, Fraternal Order of Police.

Joel A. Smith, Esquire, Lutherville, Maryland, counsel for plaintiff Baltimore Teachers Union, AFT Local 340 and the City Union of Baltimore, AFT Local 800.

Neal M. Janey, Esquire, City Solicitor, Baltimore, Maryland, Ambrose T. Hartman, Esquire, Deputy City Solicitor, Baltimore, Maryland, William R. Phelan, Jr., Esquire, Senior Solicitor, Baltimore, Maryland, and James S. Ruckle, Jr., Esquire, Assistant Solicitor, Baltimore, Maryland, counsel for defendant.

YOUNG, Joseph H., Senior United States District Judge.
Date: September 18, 1992

MEMORANDUM

On January 16, 1992, Baltimore City implemented a payroll reduction plan, which placed all City employees on five days of unpaid furlough. (the "Furlough Plan" or "Plan"). The Plan was in response to an anticipated $13.3 million dollar cut in State aid to the City of Baltimore. The Baltimore Teachers Union, the City Union of Baltimore, and the Fraternal Order of Police ("Plaintiffs") brought suit challenging the Furlough Plan as an unconstitutional impairment of the terms of their respective labor agreements with the City.

On April 3, 1992, while cross motions for summary judgment were pending before the Court, the State enacted the Budget Reconciliation Act for Fiscal 1992 (the "Act").[1] Instead of the previously forecast $13.3 million dollar cut, the new Act cut state aid to Baltimore by 4.7 million.[2] With the

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[1] Acts of the General Assembly, Chapter 62 (1992).

[2] The actual reduction in State aid for fiscal 1992 was $4,676,957.

anticipated fiscal crisis diffused, the City cancelled the Furlough Plan on April 15, 1992.

For the five pay periods that the Plan was in effect (January 16 through April 15), City employees lost the equivalent of 2.5 days of pay, or .95% of their gross annual salaries. The cost to an employee earning $13,000 per year was $124; to an employee earning $20,000 per year, $190; and to an employee earning $30,000 per year, $285. The City saved approximately $2 million dollars as a result of the Plan, and does not plan to reimburse City employees for wages withheld during this period. Plaintiffs then filed a supplemental motion for summary judgment claiming the right to be reimbursed for funds withheld.

The City argues that it remains in a fiscal crisis due to shortfalls in local revenues, and other unanticipated expenses. The City argues that the Furlough Plan was implemented pursuant to the "Neall Amendment" to the Budget Reconciliation Act which authorized the City to "take any

action necessary, including any action to reduce a previously approved appropriation, to prudently manage its fiscal affairs and to meet its obligations" in light of the cuts in State aid.[3] The City also contends that the payroll reduction plan resulted in a minimal impairment to the labor agreements negotiated between the City and City Employees, and thus does not rise to the level of an unconstitutional contractual impairment.

The proper analysis of an alleged Contract Clause violation, begins with the determination of whether a contract indeed exists. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). On November 19, 1991, the FOP and the City executed two Memoranda of Understanding governing the wages, terms and conditions of employment for City police personnel. The MOU was negotiated pursuant to the

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[3] Several issues raised in the initial cross motions for summary judgment appear to have been abandoned. These include the issue of "separation of powers," the Fair Labor Standards Act, and common law breach of contract and promissory estoppel.

Municipal Employee Relations Ordinance -- City Charter, Art. II, Sec. 55(a)(3) -- which authorizes the City to negotiate "collective bargaining agreements" setting forth such things as "salaries, wages, hours and other matters relating to employee benefits and duties[.]" See, City Code, Art I, Sec. 120(k). Although the Memoranda were negotiated well into fiscal year 1992, the City and the unions reached agreement over the issue of compensation before fiscal 1992 began, and those figures were approved by the City Board of Estimates and enacted into law by the City Council.[4] The Board of School

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[4] The City of Baltimore has what is commonly termed an executive budget system", and the Board of Estimates is at the heart of that system. Baltimore v American Federation of State etc., 281 Md. 463, 379 A.2d 1031 (1977). The Board formulates, determines and executes the fiscal policy of the City. Article VI, § 2(a).

Labor Agreements setting forth rates of compensation for city employees are negotiated between the City and its employees, then submitted to the Board of Estimates for approval. The Memorandum is merely a "recommendation," and the Board, in its discretion may decide to accept, modify or reject the terms of the Memorandum. Id.

Commissioners negotiates labor agreements with the teachers. See, City Charter, Art. VII, Sec. 59. Such agreements are specifically denominated "collective bargaining agreements" in the City Charter. Id. The process, however, is much the same as with labor agreements negotiated under the Municipal Employee Relations Ordinance. The Board of School Commissioners negotiates the terms and conditions of employment including levels of compensation, and submits a recommendation to the Board of Estimates for approval. The Board then includes the Commissioners' budget in the Ordinance of Estimates and the Ordinance is enacted into law

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For each fiscal year, the Board prepares and submits an "Ordinance of Estimates" to the City Council. This proposed ordinance must contain, among other things, a breakdown of the compensation of every officer and salaried employee of the City.

In reviewing the proposed Ordinance of Estimates, the City Council has only limited powers. It may reduce or eliminate any of the amounts fixed by the Board, but it may not increase the amounts, or insert any amount for any new purpose. Once the Ordinance of Estimates has been approved, it becomes law.

by the City Council.

By approving the bargained for levels of compensation, and enacting the Ordinance of Estimates into law, the City clearly imposed contractual obligations on itself. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).[5] In United

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[5] Compare the holding in Baltimore v American Federation of State, 281 Md. 463, 379 A.2d 1031 (1977) ("AFSCME"). In AFSCME, the Maryland Court of Appeals considered whether the Municipal Employee Relations Ordinance ("MERO") authorized the Board of Estimates to enter into a collective bargaining agreement directly with City employees. The Court concluded that the MERO provides for negotiations between employees and employer representatives, usually a municipal committee appointed jointly by the Mayor and the respective City unions. The ordinance does not contemplate negotiations between City employees and the Board of Estimates directly; nor does it authorize the Board to enter binding agreements with City employees. The Board's function, the Court said, is to consider committee recommendations and decide, based on its assessment of the total budget, whether to reduce, reject or otherwise modify the recommendations submitted.

By holding that the Board of Estimates may not bind itself directly, the State Court did not hold that a labor agreement validly negotiated between the proper committee and union, does not carry the force of a contract. In fact, the Court suggests that a validly negotiated labor agreement becomes binding when it is approved by the Board of Estimates, and

States Trust, the Supreme Court held that a statutory scheme will be treated as creating contractual obligations where the "language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the [government]." Id. at 17. Given that the Municipal Employee Relations Ordinance, and other provisions of the City Charter, call for a bargained for agreement between City employees and the City, the Court concludes that the City intended by this statutory scheme, to create private rights of a contractual nature, enforceable against the City.

Having determined that a contractual relationship exists between the parties, the inquiry turns to whether the Furlough Plan, in fact, operated as a substantial impairment of that relationship. The City argues that the Furlough Plan operates as a minimal impairment at best, and does not rise to the level of impairment meriting contract-clause analysis.

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incorporated into the Ordinance of Estimates.

The severity of an impairment measures the height of the hurdle the city ordinance must clear. "Minimal alterations of contractual obligations may end the inquiry at its first stage." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the legislation. Id. The impairment is to be measured against the legitimate expectations of the contracting parties. United States Trust Co., 431 U.S. at 19-20 n.17; Spannaus, 438 U.S. at 245-46; Energy Reserves Group Inc. v Kansas Power & Light Co., 459 U.S. 400, 411 (1983). "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." Spannaus, 438 U.S. at 245. Total destruction of contractual expectations is not necessary to find a substantial impairment. United States Trust Co. 431 U.S., at 26-27; Energy Reserves Group v.

Kansas Power & Light, 459 U.S. at 411.

In light of the Supreme Court's reasoning in Spannaus, the City's argument that the contractual impairment created by the Furlough Plan was "minimal", must fail. Plaintiffs bargained in good faith over the issues of wages and the terms and conditions of employment. Wages are expressed on an annual basis, each employee earning a defined annual salary.[6] Once a fiscal year has begun, an employee has every reason to expect that the wage rates fixed for that year will remain constant throughout the year.

For the five pay periods that the Plan was in effect, City employees lost the equivalent of 2.5 days of pay. City employees were justifiably relying on full paychecks to pay for

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[6] Wages are negotiated from year-to-year. Thus, this case does not present the impermissible situation in which one legislature attempts to bind a subsequent legislature for work and services to be performed by State employees and teachers in the future. Maryland State Teachers Asso. v. Hughes, 594 F. Supp. 1353 D. Md. 1984) (citing United States Trust, supra.)

such essentials as food and housing. It would be contradictory to hold that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crises that the Furlough Plan would create.[7]

The impairment of the City's contractual obligations to City employees was substantial; but the inquiry does not end here. Finding a substantial impairment is merely a threshold step toward resolving the more difficult question of whether that impairment is permitted under the Constitution. United States Trust Co., supra. This more difficult question is resolved by balancing the contractual rights of the individual against "the 'essential attributes of sovereign power' necessarily reserved by the States to safeguard the welfare of their citizens." Id. [cite omitted]; Home Building & Loan

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[7] Plaintiffs point out that in adopting the Ordinance of Estimates for fiscal year 1992, the City rejected a previously promised 6% wage increase for city employees. Other than promotion and longevity increases, City employees did not receive a wage increase for Fiscal 1992.

Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934)) ("reservation of essential attributes of sovereign power is ... read into contracts as a postulate of the legal order"); El Paso v. Simmons, 379 U.S. 497, 508 (1965) (state may protect public welfare notwithstanding interference with public contracts); Atlantic C. L. R. Co. v Goldsboro, 232 U.S. 548, 558 (1914) (state police power is "inalienable even by express grant"). See also, Maryland State Teachers Asso. v. Hughes, 594 F. Supp. 1353, 1360 (D. Md. 1984) ("[the] reserved powers doctrine renders void ab initio a state contract which 'surrenders an essential attribute of [State] sovereignty, since a "legislature cannot bargain away the police power of a State.") (quoting, United States Trust, supra, 431 U.S. at 23).

The authority to regulate the compensation of municipal employees, is within the police power of City government. See Maryland State Teachers, 594 F. Supp. at 1360 (citing Newton v. Commissioners, 100 U.S. 548, 559 (1879) (under the police power a state may "increase or diminish the salary

or change the mode of compensation" of its employees)); Arceneaux v. Treen, 671 F.2d 128, 135 (5th Cir. 1982); Amalgamated Transit Union v Massachusetts v. Commonwealth of Massachusetts, 666 F.2d 618, 641 (1st Cir. 1981), cert. den 457 U.S. 1117 (1982).

But, as the Supreme Court explained in United States Trust, the police power of a state does not authorize unlimited governmental modification of public contracts. Id. 25. Indeed, impairments of a government's own contracts require a more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for

> extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust Co., 431 U.S at 25-26; 244.

Critical to the issue of whether an impairment is constitutionally permissible, is (1) whether the legislation is reasonable and necessary to serve an important public purpose and (2) whether the City can offer policy justifications for its selection of means to effect that purpose. Id. See, A Process Oriented Approach to the Contract Clause, 89 Yale Law Journal 1623 (1980). See also, Association of Surrogates & Supreme Court Reporters v. New York, 940 F.2d 766 (2nd Cir. 1991); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60 (1935) (security of public bond may not be reduced without reason when public welfare may be served by less severe impairment); W.B. Worthen Co. v. Thomas, 292 U.S. 426, 434 (1934) (debtor-relief law with no time, amount,

circumstance, or need limits violates contract clause when less severe impairment would serve public goals).

There is little dispute among the parties that attending to the City's fiscal health in the midst of an unforeseen fiscal crisis is a legitimate public purpose. The parties differ as to the means chosen to effect that purpose. The City argues that despite the fact that anticipated cuts in State aid were reduced from 13.3 million dollars to 4.6 million dollars, the effects of the cuts in State aid, the State court's order prohibiting wage cuts for fire fighters and the take-over of the Baltimore City Jail by the State with concomitant employee payouts, have combined to cause an unhealthy fiscal condition.

The actual cuts in State aid amounted to .228% of the City's $2 billion dollar budget for fiscal year 1992 (Aff. McCarthy, PH.D. ¶ 4).[8] Despite the City's claims of fiscal

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[8] Defendants argue that the magnitude of the State cuts should be compared to the general fund of the City Budget, and not to the budget as a whole. If compared to the General Fund, the State cuts amount to .65% of the total budget.

distress, the City allocated 4.8 million of its operating funds to "pay-as-you-go" programs, which Plaintiffs allege, are usually reserved for programs when the City anticipates a fund surplus. The City reduced its property taxes by five cents per $100 of assessed value (from $5.95 to $5.90), turning back $3.9 million dollars to taxpayers.

At the end of fiscal 1991, a balance of $40 million dollars remained unspent in the City's general fund. Of this total, $30 million was reserved for various uses, $7.4 million

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Defendants argue that the City only has discretionary spending control over the general fund, and that the general fund is the "primary fund which is affected by the reductions in State aid." Defendants contention is without merit. The entire City operating and capital budgets are ultimately controlled by the City. Each municipal agency submits an operating budget recommendation. The Board of Estimates considers the recommendations, and makes adjustments as it sees fit. City Charter, Article 6, § 2. The proposals are then incorporated into the Ordinance of Estimates, and submitted to the City Council. The Council may also make changes, though its powers to do so are somewhat more limited. Id. Furthermore, the City Charter authorizes the Board of Estimates, and the City council, to take such action as is necessary to adjust the City's budget when faced with budgetary shortfalls. City Charter, Article VI § 2.

was designated for use in fiscal year 1992, and the remainder, $2.6 million, was left "undesignated.' (Aff. McCarthy ¶ 5(a); Aff. Gallagher ¶ 7). In contrast, by the City's own admission, the savings recaptured through implementation of the Furlough Plan, was a mere $2 million dollars.

Based on these facts, it cannot be said that the Furlough Plan was reasonable and necessary to avert a fiscal crisis. Alternatives always exist to imposing the costs of budgetary shortfalls on a class of contracting parties such as city employees. The City could have shifted the burden from another governmental program, or it could have raised taxes; an option the Court recognizes would not have been popular among politician-legislators. But the contract clause exists exactly for that reason, as a constitutional check on governmental legislation. In Hall v. Wisconsin, 103 U.S. 5 (1880), the Supreme Court opined:

> But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services during a limited period,

> this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens.

103 U.S. at 10 (quoting from Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 694 (1819) (Story, J., concurring)). In Association of Surrogates, supra, the State --- in the midst of a budget crunch and an overworked court system -- sought to solve both problems by implementing a "lag-payroll" scheme to finance the expansion of its court system. Under the scheme, the wages of certain court personnel would be deferred in a manner that was contrary to their collective bargaining agreements:

> In fact, the lag-payroll scheme smacks of the political expediency that United States Trust Co. warned of: "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." [cite omitted] Clearly, the New York legislators and its governor would prefer not to raise the taxes of their constituents; by placing the costs of improvements to the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state, they ruffle only a few feathers and fight the

> "exploding drug crisis" without raising taxes or cutting other governmental programs. But the only people paying for the new courts are the few employees of the judicial branch who are subjected to the lag payroll. The contract clause bars such expedient post hoc changes in contractual obligations, for "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." [cite omitted].

Association of Surrogates, 940 F.2d at 773 (quoting United States Trust Co., supra).

Defendants next contend that the Furlough Plan was authorized by the "Neall Amendment" to the Budget Reconciliation Act. The Neall Amendment provides:

> the governing body of ... Baltimore City, or other legal entity or authority within ... Baltimore City, may take any action necessary, including any action to reduce a previously approved appropriation, to prudently manage its fiscal affairs and to meet its obligations under this Act. This Section may not be interpreted to authorize additional taxation authority."

1992 Md. Laws ch. 62, Sec. 3(c). The Amendment is cast in broad language, and does not specifically authorize the unconstitutional impairment of pre-existing contracts. In fact,

the Amendment does not direct any 'specific' action. Thus there is no need to rule on the constitutionality of this provision at this time, and the motion for leave to intervene filed by the State of Maryland on this issue will be denied. To the extent, however, that this provision authorizes the City of Baltimore to unconstitutionally impair its contractual obligations with City employees, it is invalid.

Summary judgment is mandated if a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). The City has failed to establish that the Furlough Plan was a reasonable and necessary impairment of its contractual obligations with City employees. Accordingly, summary judgment will be entered in favor of the Plaintiffs.

/s/ Joseph H. Young
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BALTIMORE CITY LODGE NO. 3 FRATERNAL ORDER OF POLICE	*	
v.	*	Civil No. Y-92-228
MAYOR AND CITY COUNCIL OF BALTIMORE CITY	*	
BALTIMORE TEACHERS UNION, et. al.	*	
v.	*	Civil No. Y-92-440
MAYOR AND CITY COUNCIL OF BALTIMORE, et. al.	*	

ORDER

In accordance with the attached Memorandum and Order, it is this 18th day of September, 1992, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion for leave to intervene filed by the State of Maryland BE, and the same IS, hereby DENIED;

2. That defendant's motion for summary judgment BE,

and the same IS, hereby DENIED;

3. That plaintiff The Fraternal Order of Police's motion for summary judgment BE, and the same IS, hereby GRANTED;

4. That plaintiff Baltimore Teachers Unions' motion for summary judgment BE, and the same IS, hereby GRANTED;

5. That defendant BE, and the same IS, hereby ORDERED to restore to plaintiff unions for the benefit of their respective members within thirty days of the date of this Order any amounts deducted under the Board of Estimates resolution of January 16, 1992.

6. That a copy of this Memorandum and Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States District Judge

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO, THE CITY UNION OF BALTIMORE, AMERICAN FEDERATION OF TEACHERS, LOCAL 800,AFL-CIO,

Plaintiffs-Appellees,

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, Individually and in his capacity as Mayor and Member of the Board of Estimates of Baltimore City; MARY PAT CLARKE, Individually and in her capacity as President of the Baltimore City Council and Member of the Board of Estimates of Baltimore city; JACQUELINE F. McCLEAN Individually and in her capacity as Comptroller and Member of the Board of Estimates of Baltimore City; NEAL JANEY, In his capacity as Member of the Board of Estimates of Baltimore city; GEORGE F. BALOG, Individually and in his capacity as Member of the Board of Estimates of Baltimore city; BOARD OF ESTIMATES OF BALTIMORE CITY,

No.92-2234

Defendants-Appellants.

In Re: State of Maryland,

Appellant,

v.

BALTIMORE TEACHERS UNION, FEDERATION OF TEACHERS LOCAL 340, AFL-CIO; THE CITY UNION OF BALTIMORE, AMERICAN FEDERATION OF TEACHERS, LOCAL 800,AFL-CIO,

Plaintiffs-Appellees,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, Individually and in his capacity as Mayor and Member of the Board of Estimates of Baltimore City; MARY PAT CLARKE, Individually and in her capacity as President of the Baltimore City Council and Member of the Board of Estimates of Baltimore city; JACQUELINE E. MCCLEAN, Individually and in her capacity as Comptroller and Member of the Board of Estimates of Baltimore City; NEAL JANEY, In his capacity as Member of the Board of Estimates of Baltimore City; GEORGE E BALOG, Individually and in his capacity as Member of the Board of Estimates of Baltimore City; BOARD OF ESTIMATES OF BALTIMORE CITY,

No.92-2237

Defendants.

BALTIMORE CITY LODGE NUMBER 3
FRATERNAL ORDER OF Police,

Plaintiff-Appellee,

No 92-2238

v.
MAYOR AND CITY COUNCIL OF
BALTIMORE,

Defendant-Appellant.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge.
(CA-92440-Y, CA-92-228-Y)

Argued: March 3, 1993
Decided: September 2, 1993

Before WIDENER and LUTTIG, Circuit Judges, and VOORHEES,Chief United States District Judge for the Western District of NorthCarolina, sitting by designation.

Reversed and remanded by published opinion. Judge Luttig wrote the opinion, in which Chief Judge Voorhees joined. Judge Widener wrote a concurring opinion.

COUNSEL

ARGUED: Ambrose T. Hartman, Deputy City Solicitor, DEPARTMENT OF LAW, Baltimore, Maryland: Marlene Trestman, Assistant Attorney General, Baltimore, Maryland, for Appellants. Joel Allen Smith, KAHN, SMITH &

COLLINS. P.A., Baltimore, Maryland; Michael Lawrence Marshall, SCHLACHMAN, BELSKY & WEINER, P.A., Baltimore, Maryland, for Appellees. ON BRIEF: William R. Phelan, Jr., Senior Solicitor, James S. Ruckle, Jr., Assistant Solicitor, DEPARTMENT OF LAW, Baltimore, Maryland; J. Joseph Curran, Jr., Attorney General, Baltimore, Maryland, for Appellants. Christyne L. Neff; KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland; Herbert R. Weiner, SCHLACHMAN, BELSKY & WEINER, P.A., Baltimore, Maryland, for Appellees.

OPINION

LUTTIG, Circuit Judge:

In response to budgetary shortfalls, Baltimore City implemented a plan under which it ultimately reduced the annual salaries of its employees by approximately 1%, through deductions from five of their semi-monthly paychecks. Its teachers and police, through their certified collective bargaining units, brought suit alleging that the salary reductions constituted an impermissible impairment of their contracts with the City. The district court entered judgment in their favor, and we now reverse.

I.

The facts essential to the resolution of this case are

simple and not in dispute. Baltimore has what is commonly known as an "executive budget system," the chief executor of which is the City's Board of Estimates. *See generally City of Baltimore v. American Fed'n of State, County & Mun. Employees,* 379 A.2d 1031, 1034-36 (Md. 1977). Pursuant to the Municipal Employee Relations Ordinance ("MERO"), the police negotiate memoranda of understanding embodying the terms of their employment with the City, which are approved by the Board of Estimates and collected with other budgetary obligations in an Ordinance of Estimates. The Ordinance of Estimates is then enacted into law by the City Council. The process for the City's teachers, though not pursuant to MERO, is apparently similar. The Board of School Commissioners negotiates the terms of employment, which are then approved by the Board of Estimates, included in the Ordinance of Estimates, and enacted into law by the City Council. It is undisputed that these procedures were followed for Fiscal Year 1992, the period relevant to this litigation.

As of October 1991, Baltimore had lost a total of approximately $24.2 million in state aid, $4.78 million of which was cut pursuant to special authority granted the Governor by the General Assembly meeting in special session. Baltimore responded to this round of cuts with a variety of measures, such as layoffs, elimination of positions, and early retirements. Having failed to reverse the tide of the State's financial fortunes, the Governor announced in December 1991 a new round of proposed cuts in state aid to Baltimore, equal to approximately $13.3 million, and in response Baltimore implemented its so called furlough plan. Under the plan, full-time city employees, except for firefighters, who enjoy certain privileges, lost the annual equivalent of 2.5 days of pay, or .95% of their gross annual salary, and Baltimore saved approximately $2 million, which it does not intend to refund. These salary reductions were less than those originally contemplated under the plan, because it was discontinued midstream after the General Assembly approved only $4.68

million of the cuts proposed by the Governor for Baltimore City.

Seeking restitution, the teachers and police brought suit, charging that their salary reductions violated the Contract Clause, U.S. Const. art. I, 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts ...."). The district court ruled in their favor and this appeal followed.

II.

Though the Contract Clause is phrased in absolute terms, the Supreme Court does not interpret the Clause absolutely to prohibit the impairment of either government or private contracts. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977) ("Although the Contract Clause appears literally to proscribe 'any' impairment, this Court observed in *Blaisdell* that 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.'" (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398,

428 (1934))).[1] Rather, it has formulated essentially a three-part analysis for harmonizing the command of the Clause with the "necessarily reserved" sovereign power of the states to provide for the welfare of their citizens. *Id.* [2]

As a threshold matter, it must be determined whether

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[1] *See also Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240* (1978) (The language of the Contract Clause appears unambiguously absolute .... The Clause is not, however, the Draconian provision that its words might seem to imply.").

Justice Black, in dissent in *City of El Paso v. Simmons,* 379 U.S. 497, 517 (1965), characterized the jurisprudence that resulted from the Court's refusal to adhere to the language of the Clause as a "balancing away [of the plain guarantee of the Contract Clause, a characterization that was disputed by the Court in *United States Trust.* 431 U.S. at 29. *But see Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410 (1983) (In *Blaisdell,* [t]he Court balanced the language of the Contract Clause against the State s interest in exercising its police power, and concluded that the statute was justified.").

[2] The Court has described the police power as "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, [which] is paramount to any rights under contracts between individuals." *Spannaus,* 438 U.S. at 241.

there has been impairment of a contract *See, e.g., id.* at 17 ("[A]s a preliminary matter, appellants claim requires a determination that the [law] has the effect of impairing a contractual obligation."). Second, it must be determined "whether the state law has, in fact, operated as a *substantial* impairment of a contractual relationship." *Spannaus,* 438 U.S. at 244 (emphasis added); *see also Bannum, Inc. v. Town of Ashland,* 922 F.2d 197, 202 (4th Cir. 1990) (legislation must constitute "a severe impairment of the [contractual] right"). Finally, assuming there has been a substantial impairment of contract, it must be determined whether that impairment is nonetheless permissible as a legitimate exercise of the state s sovereign powers, an inquiry that differs subtly depending upon whether the contract impaired is a private or, as here, a public one. Analyzing Baltimore's action within this framework, we agree with the district court that the City substantially impaired an extant contract with its teachers and police. We conclude, however, affording the requisite degree

of deference to the City s legislature, that the impairment was in exercise of the City's legitimate powers and thus permissible under the Contract Clause.

A.

1.

We have little trouble concluding, as did the district court, *see* J.A. at 344-45, that Baltimore intended to and did enter into contractual relationships with its teachers and police, at least upon enactment into law of the Ordinance of Estimates. *Cf. United States Trust,* 431 U.S. at 17 n.14 ("In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.") *American Fed'n,* 379 A.2d at 1035. Upon enactment of the Ordinance, the City Council formally ratified the essential agreement between the City and its employees embodied in the memoranda of understanding and authorized funding for the City s obligations under those memoranda.

There was, we believe, also an impairment of those contracts. The teachers and police indisputably received less in salary than they were entitled to receive under the terms of their contracts. Only if the employees' salaries were subject to unilateral adjustment by the City under the terms of the contract could it possibly be concluded otherwise. In this regard, the City argues that any contract that existed was expressly subject to the Baltimore City Charter which, it contends, permitted the reductions. Appellants Br. at 17. We reject this contention.

Given the value ascribed to contracts in our society, and the Constitution's explicit proscription on the state's impairment of contracts, we would not hold, absent the clearest evidence, that the City intended to confer upon the Board of Estimates even the power unilaterally to modify the City s contracts. We do not read the City Charter as clearly evidencing such an intent. As the City notes, the memoranda of understanding were made explicitly subject to the provisions

of the City Charter, *see* Baltimore, Md., Code art. I, §119, 123, and, in any event, contracts generally are understood to incorporate existing law, such as the Charter,[3] *see Blaisdell,* 290 U.S. at 435-36. But section 2(g) of the Charter, which the City argues most clearly authorizes the modification of contracts, only authorizes the Board of Estimates to effect "reductions . . . in appropriations." this power does not necessarily subsume the power to modify contracts,[4] and

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[3] Baltimore, Md., Charter art. VI, § 2(g) provides that "[i]n case of any such deficiency [arising from a failure to realize sufficient income from all sources to meet the amounts provided in the Ordinance of Estimates] the Board of Estimates shall effect reductions . . . in appropriations

[4] It is unclear whether the events here even triggered applicability of section 2(g). That section authorizes reductions in appropriations only in the event of a "deficiency." At the time the furlough plan was adopted in January, however, the Maryland General Assembly had yet to authorize the Governor to effect the anticipated cuts in funding to the City, an event which did not occur for several months and even then in amounts different from those originally contemplated.

Even assuming that section 2(g) was applicable, it is far from clear that the furlough plan constituted a reduction in "appropriations" as contemplated in section 2(g). The record

therefore does not clearly evidence an intention to authorize such modifications.[5]

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reflects that the Board of Estimates implemented the furlough plan merely by approving the recommendations made to it in a January 15, 1992, letter from Edward Gallagher, Chief of the Bureau of the Budget and Management Research Division of the Baltimore Department of Finance. *See* J.A. at *35; see also* Appellants Br. at *13* ("The pay reduction plan was put into effect immediately after the Board of Estimates approved it on January 16, 1992."). That letter makes no mention of section 2(g) or, for example, of a reduction in appropriations to any particular city program. Indeed, it makes no mention of any reduction in "appropriations" at all. Rather, the letter refers only to an "across-the-board reduction in payroll costs" which would result in "financial savings." *Id.* Moreover, terminating the furlough plan after only one-half of the approved payroll reduction had been realized required no further action by the Board of Estimates, at least in the opinion of the Mayor, who unilaterally directed the Department of Finance to cease the payroll deductions. *Id.* at 191. These somewhat truncated procedures, especially given that the City proffered no evidence of an actual appropriation reduction and does not refer to any such evidence in this court, belie the suggestion that an appropriation reduction ever occurred.

[5] The concurrence would hold that the City, through the Neall Amendment, *see* Budget Reconciliation Act for Fiscal Year 1992 § 9(a), was authorized unilaterally to contravene the terms of its contracts with the police unions and thus that there was no impairment of their contracts. That amendment provides in relevant part that the City "may take any action necessary, including any action to reduce a previously

Whether the impairment of the employees' contracts was substantial is a slightly more difficult question, but one that we believe also must be answered in the affirmative. A respect for the vital role of contract generally informs the "substantiality" inquiry:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged. those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Spannaus, 438 U.S. at 245. The Supreme Court, however, has

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approved appropriation, to prudently manage its fiscal affairs and to meet its obligations under [the Budget Reconciliation Act for Fiscal Year 1992]." If the Neall Amendment were read to authorize any contravention of contractual terms, as the concurrence would read it, it is doubtful that there ever existed (or ever could exist) a contract between the City and its employees, because there would have been a failure of mutual obligation. More importantly, even assuming such a failure were not fatal to contract formation, the Amendment, so read, would almost certainly violate the Contract Clause itself.

provided little specific guidance as to what constitutes a "substantial" contract impairment. It is clear that not all impairments are substantial for Contract Clause purposes. "Technical" impairments, for example, do not necessarily rise to the level of constitutional violations. *See id.* ("Minimal alteration of contractual obligations may end the inquiry at its first stage."); *see also United States Trust,* 431 U.S. at 21 ("A finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."). By the same token, there is plainly no requirement of total repudiation. *See Energy Reserves,* 459 U.S. at 411 ("Total destruction of contractual expectations is not necessary for a finding of substantial impairment."); *United States Trust,* 431 U.S. at 26. The ground between these spectral ends, though, has yet to be charted with any precision.

While the Court has not refined the analysis for assessing the substantiality of an impairment, it has appeared

to assume that an impairment is substantial at least where the right abridged was one that induced the parties to contract in the first place, *see El Paso,* 379 U.S. at 514 ("We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement ...."); *Spannaus,* 438 U.S. at 243 n.14 (noting that *El Paso* Court concluded that the "'measure taken . . . was a mild one indeed'" because it did not affect term that induced contract (quoting 379 U.S. at 616)); *see also id.* at 245 & n.17 (citing to n.14 discussion of *El Paso's* inducement inquiry in support of statement that "minimal alteration" of contract obligations may not violate Clause), or where the impaired right was one on which there had been reasonable and especial reliance,[6] *see, e.g.,*

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[6] The Court has long regarded the "contemporaneous state law pertaining to [contract] interpretation and enforcement" as effectively incorporated into contracts, even if the parties have not expressly incorporated it. *See, e.g., United States Trust, 431 U.S.* at 19 n.17.

Spannaus, 438 U.S. at 246 (noting that state law changed obligations "in an area where the element of reliance was vital"); *id.* ("[The company] relied heavily, and reasonably, on this legitimate contractual expectation ...."); *id.* ("Thus, a basic term of the pension contract -- one on which the company had relied for 10 years -- was substantially modified.").[7]

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[7] On occasions, the Court has inquired whether the impairment altered the parties "legitimate expectations." *United States Trust, 431 U.S.* at *20* n.17; *see also Spannaus, 438 U.S.* at *247* (noting absence of evidence that the disruption of "contractual expectations" was necessary). It is unclear whether the Court regards this inquiry as different from its inquiry into whether the parties actually relied upon the existence of the contractual right impaired. *Spannaus'* primary emphasis on reliance suggests that the Court's general reference to contract expectations was merely a shorthand for reliance. To the extent that actual reliance and expectations are not intended to be the same, however, the inquiry into expectations is reminiscent of that undertaken "[d]uring the early years when the Contract Clause was regarded as an absolute bar to any impairment," *United States Trust,* 431 U.S. at 20 n.17. While such an inquiry would have been relevant then (as now) on the question of whether there has been an impairment at all, *see Energy Reserves,* 459 U.S. at 416 (Court found no impairment where "[i]n short, ERG's reasonable expectations have not been impaired by the Kansas Act."); *Veix*

The Court, thus, has refused to invalidate a state's statute of repose, on the ground that the reinstatement right affected by the statute "was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking." *See El Paso,* 379 U.S. at 514. Similarly, because the affected party could not have relied upon receipt of such benefits, the Court has "regarded the elimination of unforeseen windfall benefits as a reasonable basis for sustaining changes in statutory deficiency Judgment procedures." *United States Trust,* 431 U.S. at 31 n.30 (citing cases). It sustained in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.,* 300 U.S. 124, 130 (1937), for example, a state law that "recognize[d] the obligations of [the mortgagee's] contract and his right to its full enforcement but limit[ed] that right so as to prevent his obtaining more than his

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v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S.32,40(1940), it would appear to be of little probative value in determining whether a particular impairment is substantial.

due." And the Court has approved modifications of contractual provisions on which there could have been no reliance, either because the parties explicitly provided or because they should have recognized, that the particular rights were necessarily subject to legislative impairment. *See supra* note 6 (*citing Energy v. Reserves* and *Veix).*

Based upon these authorities, we are confident that, *at the very least,* where the contract right or obligation impaired was one that induced the parties to enter into the contract and upon the continued existence of which they have especially relied, the impairment must be considered "substantial" for purposes of the Contract Clause.

In the employment context, there likely is no right both more central to the contract's inducement and on the existence of which the parties more especially rely, than the right to compensation at the contractually specified level. Accordingly, we believe that the salary reductions at issue constituted a substantial impairment of the employees' contract with the City

of Baltimore.[8]

B.

This does not end the analysis, however. "The Contract Clause is not an absolute bar to subsequent modification of a

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[8] To the extent that the magnitude of the ensuing economic loss from an impaired contract (as opposed to the nature of the right impaired) is relevant to the question of the substantiality of the impairment, we reject the City s contention that an annual salary reduction of .95% is insubstantial. Based upon an annual salary of $25,000, this amount could represent a substantial portion of a monthly mortgage or rental payment, or weeks of food. Indeed, because individuals plan their lives based upon their salaries, we would be reluctant to hold that any decrease in an annual salary beyond one that could fairly be termed *de minimis* could be considered insubstantial. *See, e.g., Association of Surrogates v. New York,* 940 F.2d 766, 772 (2d Cir. 1991) (A 10% reduction in salary over 20 weeks prompted court to remark that "[t]he affected employees have surely relied on full paychecks to pay for such essentials as food and housing."), *cert. denied, 112 S.* Ct. 936 (1992) *("Surrogates"); Association of Surrogates v. New York, 588* N.E.2d 51, 54 (N.Y. 1992) (10% reduction in salary over 10 weeks "not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and the other necessities of life"); *cf. Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 n.9 (1969) ("For a poor man to lose part of his salary often means his family will go without the essentials." (internal quotations omitted)).

State's own financial obligations." *United States Trust,* 431 U.S. at 25. We must yet "attempt to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power' necessarily reserved by the States to safeguard the welfare of their citizens." *Id.* at 21 (quoting *Blaisdell,* 290 U.S. at 435) (citation omitted); *see also id.* at 23 ("In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."); *El Paso,* 379 U.S. at 509 ('The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects."); cf. *United States Trust,* 431 U.S. at 23 n.20 ("[A] state is without power to enter into binding contracts not to exercise its police power in the future."). As where a government modifies a wholly private contract, a government modification of its own financial obligations must be "reasonable and necessary to serve an important public purpose." *Id.* at 25; *see also Energy Reserves,* 459 U.S. at

411 ("If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation ...."); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 505 (1987) ("significant and legitimate public purpose"); *see also Energy Reserves,* 459 U.S. at 412 ("The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."). Neither the teachers nor the police disputes that ensuring the financial integrity of the City is a significant public purpose. Both argue, however, that the furlough plan was neither reasonable nor necessary to achieve this purpose.

When a state acts to impair private contracts, "courts properly defer to legislative judgments as to the necessity and reasonableness of a particular measure." *United States Trust,* 431 U.S. at 23. Public contracts stand on a somewhat different footing. Because "the State's self-interest is at stake,"

id. at 26, these contracts occupy what the Court has termed a "special status" for Contract Clause purposes, *id.*, and must be more scrupulously examined, *see, e.g., Spannaus,* 438 U.S. at 244 & n.15.[9] Unlike with respect to state impairments of private contracts, *"complete* deference" to legislative assessments of the reasonableness and necessity for modifying public contracts is not appropriate. *United States Trust,* 431 U.S. at 26 (emphasis added). While complete deference is inappropriate, however, at least some deference to legislative policy decisions to modify these contracts in the public interest must be accorded.[10] *See Continental Ill. Nat'l Bank & Trust*

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[9] The Court consistently has reaffirmed that "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties." *Spannaus, 438 U.S.* at *244* n.15 (citing *United States Trust,* 431 U.S. at 22-23); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 n.13 (1983) ("The statutes under review in *United States Trust Co.* also implicated the special concerns associated with a State's impairment of its own contractual obligations.").

[10] The Court has never expressly stated that any deference is owed legislative judgments in the context of public contract

Co. v. Washington, 696 F.2d 692, 701 (9th Cir.) ("Because he State is a contracting party, we give *less* deference to its claims of justification for impairment" (emphasis added, citing *United States Trust,* 431 U.S. at 25-26)), *appeal dismissed,* 460 U.S. 1077 (1983); *Local 589, Amalgamated Transit Union v. Massachusetts,* 666 F.2d 618, 643 (1st Cir. 1981) (Even in cases involving public contracts, "where economic or social

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impairment. However, the most reasonable inference one gains from comparing its characterization in *United States Trust* of the deference due legislative judgments in the private contract context, *see* 431 U.S. at 22-23 (courts properly defer to such judgments), with that due such judgments in the public contract context, *id.* at 25-26 ("complete deference . . . is not appropriate"), is that *some* degree of deference is appropriate even where a state acts to impair its own contracts.

Indeed, although the Court has never specified what it intends by the requirement of a more searching examination, it appears to mean by this only that the legislature's asserted justifications for the impairment shall not be given the complete deference that they otherwise would enjoy. *See, e.g., Energy Reserves,* 459 U.S. at 413 n.14 (stating, after quoting *United States Trust* that complete deference is not required in public contract impairment context, that "stricter standard" of *United States Trust* does not apply because state has not altered its own contractual obligations).

legislation is at issue, some deference to the legislature's judgment is surely called for."), *cert. denied,* 457 U.S. 1117 (1982). *But cf. Nevada Employees Ass'n, Inc. v. Keating,* 903 F.2d 1223, 1226 (9th Cir.) (Its decisions "do not indicate that the Court would defer to state legislatures when public as opposed to private contracts are at issue."), *cert. denied,* 498 U.S. 999 (1990). The district court afforded essentially no deference whatsoever to Baltimore's determinations of the reasonableness and necessity of the salary reductions, *see* J.A. at 351 ("Alternatives always exist to imposing the costs of budgetary shortfalls on a class of contracting parties such as city employees."), and it is at least in part because of this failure that it erred.

It is not enough to reason, as did the district court, that "[t]he City *could have* shifted the burden from another governmental program," or that "it *could have* raised taxes." *Id.* (emphases added). *But see Surrogates,* 940 F.2d at 773. Were these the proper criteria, no impairment of a

governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be. Our task is rather to ensure through the "necessity and reasonableness" inquiry that states neither "consider impairing the obligations of [their] own contracts on a par with other policy alternatives" or "impose a drastic impairment when an evident and more moderate course would serve its purposes equally well," *United States Trust,* 431 U.S. at 30-31, nor act unreasonably "in light of the surrounding circumstances," *id.* at 31.

We are satisfied that Baltimore City did neither. Required by law to balance its budget, the City took what we believe to be needed and measured steps to absorb extraordinary reductions in revenue.[11] By October 1991,

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[11] The public purpose justifying an impairment of contract need not be "an emergency or temporary situation," although the existence of an emergency is of course relevant. *Energy Reserves,* 459 U.S. at 412; *see also Spannaus,* 438 U.S. at 249 n.24 ("This is not to suggest that only an emergency of great magnitude can constitutionally justify a state law impairing the

facing a deficit of some $450 million, the State of Maryland had dramatically decreased funding to local governments for Fiscal Year 1992, with the net effect that Baltimore lost approximately $24.2 million in state aid. In response to these cuts, the City, which was already suffering from the sluggish economy and poor financial management, not only abandoned previously negotiated pay raises but also effected other nonsalary cost savings. Because personnel costs constitute such a large percentage of its expenditures (for example, 91.8% of the Police Department budget and 82.5% of the Public School budget), however, Baltimore was also forced to resort to such measures as layoffs, job abolishments, and early retirements.

In December 1991, nearly midway through the fiscal year, the State proposed an eleventh-hour, second round of cuts in state aid to the City, totaling approximately $13.3

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obligation of contracts.").

million. Only then, and only in order to maintain its budget in balance and avoid further layoffs, did the City resort to the furlough plan at issue here.[12] The City's obvious reluctance to resort to the plan and its decision to do so only when it concluded that it had no better alternative belies the "political expediency" suspected in *Surrogates,* 940 F.2d at 773, and confirms that the City did not consider salary reductions on a par with other policy choices, *see United States Trust,* 431 U.S. at 29-31.

Nor on such facts as these can we conclude that the City chose a drastic impairment over an equally acceptable, more moderate course. First, the amount of the reduction was no greater than that necessary to meet the anticipated shortfall. *See United States Trust,* 431 U.S. at 29-30 (criticizing "total

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[12] The salary reduction was but one of a number of the measures taken by the City. Additional features of its plan included "the use of the Fiscal 1991 General Fund balance; interest cost savings due to a delay in going to the bond market; rent from the Orioles, and anticipated proceeds from the sale of City property." J.A. at 35.

repeal" of bond covenant when "a less drastic modification would have permitted the contemplated plan without entirely removing the covenant s limitations"). Second, the city discontinued the plan immediately upon recognition that the budgetary shortfall would not be so great as anticipated. *See Energy Reserves,* 459 U.S. at 418 (noting approvingly that "the Act is a temporary measure that expires when federal price regulation of certain categories of gas terminates."). Finally, the plan did not alter pay-dependent benefits, overtime pay, hourly rates of pay, or the orientation of pay scales. *See United States Trust,* 431 U.S. at 27 ("The extent of impairment is certainly a relevant factor in determining its reasonableness."). Indeed, the plan was less drastic than at least one alternative, additional layoffs, which could have been more detrimental to appellees. *See Faitoute Iron & Steel Co. v. City of Asbury Park* 316 U.S. 502, 516 (1942) (upholding law affecting municipal bond terms in part because it benefitted the bond holders); *see also* Reply Br. at 13 ("Appellees advance no

basis for disputing the fact that the pay reduction was an alternative, presumably a preferred alternative, to layoffs."). In short, the City clearly sought to tailor the plan as narrowly as possible to meet its unforeseen shortfalls.

We also conclude that the salary reductions were reasonable under the circumstances. In addition to its careful tailoring, the furlough plan possessed, not insignificantly, each of the attributes identified in *Spannaus* as present in various state laws that had impaired private contracts but survived Contract Clause challenge. First, the plan was designed to "deal with a broad, generalized economic or social problem." 438 U.S. at 250 (citing *Blaisdell,* 290 U.S. at 445); *see also Exxon,* 462 U.S. at 191 (noting approvingly that the statute "did not prescribe a rule limited in effect . . ., but instead imposed a generally applicable rule of conduct designed to advance 'a broad societal interest'" (quoting *Spannaus,* 438 U.S. at 249)); *id.* at 192 ("main effect" of Act was "shielding

consumers").[13] Indeed, according to the City, prior to implementation of the furlough plan, "[i]t was approaching the point where it [had] to begin cutting basic services and initiating the breakdown of government." Appellants' Br. at 21.

Similarly, unlike the special interest character of the legislation at issue in *Spannaus*, Baltimore's plan did not narrowly target specific classes of employees; it extended to all City employees. *See Exxon*, 462 U.S. at 176 ("The prohibition applied to all oil and gas producers ...."); *id.* at 192 ("sharply distinguish[ing]" *United States Trust* and *Spannaus* because the measures at issue there imposed no "generally applicable rule

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[13] Whether the changed circumstances that prompted an impairment were changes in degree or in kind is relevant to whether the impairment was reasonable. *See, e.g., United States Trust*, 431 U.S. at 31-32. To the extent the City was aware of its precarious financial condition and of possible reductions in state aid when it enacted its budget, however, we believe that the magnitude of the reductions in state aid rendered the budgetary shortfall that gave rise to the salary reductions tantamount to a difference in kind from one the City might otherwise have anticipated.

of conduct"); *Energy Reserves,* 459 U.S. at 412 n.13 ("The pension statute [in *Spannaus*] had a very narrow focus: it was aimed at specific employers."); *Spannaus,* 438 U.S. at 248.

Third, the plan affected reliance interests not wholly unlike those of private entities in regulated industries, which contract subject to future, additional regulation. *See, e.g., Energy Reserves,* 459 U.S. at 416; *Spannaus,* 438 U.S. at 250 (law affected "an area already subject to state regulation" (citing *Veix,* 310 U.S. at 38)); *see also Exxon,* 462 U.S. at 194 n.14 ("Our conclusion is buttressed by the fact that appellants operate in industries that have been subject to heavy regulation."). Public employees -- federal or state -- by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest. It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice.

Finally, the plan "effect[ed] simply a temporary

alteration of the contractual relationships of those within its coverage." *Spannaus,* 438 U.S. at 250 (citing *United States Trust,* 431 U.S. at 22); *United States Trust,* 431 U.S. at 22 n.19 ("limited duration" of impairment is factor in reasonableness determination). The City, as noted, immediately discontinued the plan at the first opportunity and correctly does not suggest that it would be free to employ salary reductions as a common budgetary tool in the future.

* * *

The authority of the states to impair contracts, to be sure, must be constrained in some meaningful way. The Contract Clause, however, does not require the courts -- even where public contracts have been impaired -- to sit as superlegislatures, determining, for example, whether it would have been more appropriate instead for Baltimore to close its schools for a week, an option actually considered but rejected, or to reduce funding to the arts, as appellees argue should have been done. Not only are we ill-equipped even to consider the

evidence that would be relevant to such conflicting policy alternatives; we have no objective standards against which to assess the merit of the multitude of alternatives. While the Court today presumably would not accept in the public contract context the absoluteness of Justice Frankfurter's response to a similar request in a private contract context that the Court reject a governor's and legislature's determination that the state's public welfare required further suspension of mortgage foreclosures (or at least not the implication of his response), his essential point is relevant in both contexts: "Merely to enumerate the elements that have to be considered [in determining whether the public welfare decision was reasonable] shows that the place for determining their weight and their significance is the legislature not the judiciary." *East New York Sav. Bank v. Hahn,* 326 U.S. 230, 234 (1945).

In light of the magnitude and timing of the proposed cuts in state funding that prompted the City's salary reductions, the undisputed legitimacy of the City's need to balance its

budget, the City's concerted efforts to exhaust numerous alternative courses of cost reduction before resorting to the challenged reductions, the circumscribed nature of the furlough plan, and the City's immediate abandonment of the reductions at the first opportunity, we believe -- according the legislature some deference but without accepting its assertions uncritically -- that Baltimore's plan was, as it must be, "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust,* 431 U.S. at 22. Accordingly, we conclude that the City's modification of its employees' contracts was an impairment permitted by article 1, section 10.[14]

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[14] We remand this case to the district court for consideration of several issues it mistakenly believed the parties had abandoned. *See* J.A. at 342 n.3 ("Several issues raised in the initial cross motions for summary judgment appear to have been abandoned."); Appellants' Br. at 2 n.1 ("The parties have agreed that the Plaintiffs did not abandon any of their claims ...."*); see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Our disposition of this case renders moot,

CONCLUSION

For the reasons set forth above, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent herewith.

REVERSED AND REMANDED

WIDENER, Circuit Judge, concurring:

I agree with the majority that the district court should be reversed. I also agree that the claims which were not considered by the district court should be remanded.[1] See slip op. at 19 n. 14. I write separately, however, to note my disagreement with the majority's view that the contracts were

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however, the State of Maryland's appeal from the district court's denial of its motion for leave to intervene, and accordingly we decline to review that ruling.

[1] Neither the majority nor I express an opinion on whether the district court has jurisdiction to hear the remaining claims. If such jurisdiction is claimed and is discretionary, neither expresses an opinion on whether the district court should exercise it.

impaired. Because I believe that the terms of the Memoranda of Understanding between the City and the police unions and the terms of the collective bargaining agreements between the City and the teachers' unions necessarily included the statutory and charter authorization for the Board of Estimates' actions, I would not reach the impairment issue. Simply put, I do not believe there was any impairment of the contracts, the police for either of two reasons, the teachers for one.

I.

The majority correctly notes that contracts generally, as those at issue do, are understood to incorporate existing law, including city charters. Slip op. at 7. Section 2(g) of the Baltimore City Charter provides:

> No temporary loan shall be authorized or made to pay any deficiency arising from a failure to realize sufficient income from all sources to meet the amounts provided in the Ordinance of Estimates .... In case of any such deficiency the Board of Estimates shall effect reductions (which need not be pro rata) in appropriations other than those for payment of the principal and interest of the City debt and such amounts

> as are fixed by law and contained in said Ordinance of Estimates, except to the extent that the City Council shall, upon the recommendation of the Board of Estimates, enact an ordinance which shall supply revenues to meet all or any part of such deficiency.

City of Baltimore, Md. Charter Art. VI, § 2(g). The question before us, then, is whether the Board of Estimates' adoption of the furlough plan was action authorized by section 2(g).

The context in which the City was acting is pertinent to this dispute. The record in this case reveals that the Budget Reconciliation Act of 1992, which contained a $4.78 million cut to the City, was approved by the Governor on October 18, 1991. The October cut brought the total reduction in state aid to Baltimore City for fiscal year 1992 to about $24.2 million. The City took action to offset the state aid cuts, including layoffs, job abolishments, and early retirements, but it did not implement the furlough program complained of here. In December, new legislation, the Second Budget Reconciliation Act, was pending in the legislature that contained further cuts

in state aid. The proposed bill, House Bill No. 458, authorized additional cuts in state aid to the City of $13.3 million. In light of the bill, the City took steps to develop and implement the furlough plan. The furlough plan was implemented in January, 1992, after the Board of Estimates approved it on January 16. It is important to note that the City was taking action because of the anticipated cuts still pending in the legislature. Gallagher Affidavit at ¶ 8. However, when the Second Budget Reconciliation Act was passed by the Maryland legislature in April, it contained much smaller cuts, $4,676,957, than the bill pending in December and January. The City then halted the furlough plan "because of the drop in magnitude of the final installment of State revenue reductions to the City, and an estimate that the payroll savings accrued during the [time the plan was in effect] may be sufficient, along with the non-labor savings [implemented earlier], to deal with the City's General Fund problem for Fiscal Year 1992." Gallagher Supplemental Affidavit of May 11, 1992 at ¶ 8.

The district court's opinion did not mention the City Charter, and the majority argues that Section 2(g) is not authority for the Board's action. The majority argues at this conclusion because it decides Section 2(g) does not confer upon the Board the power to modify contracts. As did the district court, the majority has viewed this case from the beginning as a case of impairment of a contract under the contracts clause, and has not recognized that the City's Charter provisions confer upon the Board the authority to reduce appropriations in whatever manner necessary, even if the obligation exists by virtue of a contract. The grant of power is broad and is not held by any other body of city government. The only restrictions upon the Board are that it must pay the city debt and it must pay those amounts fixed by law. The Board does not even have to reduce appropriations pro rata. City of Baltimore, Md. Charter Art. VI, § 2(g). The amounts reduced here are not fixed by law, but by contract; they are not a part of the City's debt. Although not explicit in the majority's

opinion, it apparently has decided that the Board's initial adoption of appropriations in the amounts set forth in the Memoranda of Understanding somehow confers on these appropriations a special status. See slip op. at 7-8. However, if that were true, every amount contained in the Ordinance of Estimates would be sacred, and the provision in the Charter would be meaningless.

The majority further argues that Section 2(g) does not apply to the fact situation here.[2] On that point, it states:

> [Section 2(g)] authorizes reductions in appropriations only in the event of a "deficiency." At the time the furlough plan was adopted in January, however, the Maryland General Assembly had yet to authorize the Governor to effect the anticipated cuts in funding to the City, an event which did not occur for several months -- and even then in

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[2] The majority also argues that it is not clear whether the furlough plan constituted a reduction in appropriations, which is the only action that Section 2(g) grants to the Board. Slip op. at 8, n.4. Had the majority considered the actions of the Board to be a reduction in appropriations, of course, that issue would not have remained in the case upon which to rest a finding of impairment.

> amounts different from those originally contemplated.

Slip op. at 8 n. 4. That reasoning overlooks that there already was a deficiency from the first cuts and that, in the end, there was a second cut. It is irrelevant what the size of the deficiency was; all that was necessary for the Board to act was a deficiency. The City could have cut the labor costs at issue here much earlier, but instead chose to wait and try other methods. The City also knew that it would have to take much more drastic action than the furlough plan if it did not act on the anticipated $13.3 million cut as soon as possible, because the cuts were for the current fiscal year. Gallagher Affidavit at ¶ 8. The City's actions thus were not only authorized, they also were most sensitive to the employees needs. The majority seems to argue, however, that the Board should have waited and laid off employees in April rather than attempting to address the issue in a less harsh manner as early as it could. I simply do not agree with that suggestion. I think the Board

acted reasonably, lawfully, and with as little harshness as possible in quite difficult circumstances.

II

As to the police union Memoranda, I also believe the majority was mistaken in limiting it discussion, of whether the City or the Board of Estimates had the power to modify contracts, to those powers conferred by the City Charter. The power of the Board of Estimates to modify the appropriations in this case did not come only from the Charter, but also was conferred by the legislation authorizing the City to take appropriate action to deal with the budget shortfalls that were anticipated because of the decrease in state aid. See Budget Reconciliation Act for Fiscal Year 1992 § 9 (a) which provides:

> Subject to the provisions of subsection (b) of this section [not applicable here], the governing body of a county or Baltimore City, or other legal entity or authority within the county or Baltimore City, may take any action necessary, including any action to reduce a previously approved appropriation, to prudently manage its

> fiscal affairs and to meet its obligations under this Act. This subsection may not be interpreted to authorize additional taxation authority.

The facts in this case reveal that the Memoranda of Understanding between the police unions and the City were entered into after the passage of the Budget Reconciliation Act for fiscal 1992 which authorized the City's furlough plan. The record is that the Budget Reconciliation Act was approved by the Governor on October 18, 1991. The Memoranda of Understanding for the police unions were signed on November 19, 1991.[3] Therefore, when the parties signed the Memoranda for the police, they were aware of a shortfall in state aid and that the City had been authorized to "take any action necessary, including any action to reduce a previously approved appropriation," under Budget Reconciliation Act §9(a), to deal with the shortfall. Still, the City prudently

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[3] The agreement for the teachers unions were apparently entered into in 1989, before the passage of the Act. Thus the teachers' contracts are not subject to the Act.

waited. It was only in December, when the Second Budget Reconciliation Act was pending in the legislature, which contained even more cuts in state aid, that the City took steps to develop and implement the furlough plan.

The case before us, then, is that the City was granted authority to deal with reductions in the state aid appropriations in the Budget Reconciliation Act, and used that authority when it learned of the massive cuts anticipated in the Second Budget Reconciliation Act. When those massive cuts did not turn out to be as large as feared and threatened, the City stopped the furlough plan. And, the police unions now complaining of the furlough plan knew that the Governor had signed into law the City's authority to deal with the reductions before they signed the Memoranda of Understanding with the City.

It is axiomatic that the Constitution grants no entitlements to government benefits. See, e.g., *Harris v. McRae,* 448 U.S. 297, 316-318 (1980) (Congress may choose to provide Medicare funds for medically necessary abortions,

but not elective abortions). The ability of the State of Maryland to change the appropriation to the City was known as a matter of law by all of the parties, and the grant to the City of authority to reduce funds already appropriated also had been made. This was part of the law that necessarily was incorporated into the Memoranda of Understanding signed by each of the appellee police unions. The City and the police unions took the risk of negotiating agreements and fixing budgets that relied on State aid without knowing whether that aid would materialize in the necessary amount and, in fact, had been warned that it likely would not. When it was threatened that even further deep cuts would be made by the Second Budget Reconciliation Act, adjustments had to be made. For the police unions now to argue that the City cannot adjust its appropriations downward when the budget and those appropriations were calculated on the basis of funds that the City did not receive defies logic as well as law in light of the legislative grant which was known to all parties before the

Memoranda were signed.

The district court based its analysis on finding a contract and an impairment. When it finally reached the constitutional argument as to the validity of § 9(a) of the statute, the district court considered it under the federal constitution and did not reach that issue until after it had found an unconstitutional impairment. It seems to me, however, that the appropriate analysis should start with the source of the City's power to implement the policy at issue.[4]

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[4] The majority's discussion of Section 9(a) in footnote 5 of its opinion overlooks two very important facts: The Neall Amendment had been passed *before* the police unions ever signed their Memoranda with the City, and all contracts are understood to incorporate pre-existing law. The majority admits as much in its opinion, but then argues in footnote 5 that pre-existing law incorporated into a contract can violate the Contracts Clause of the Constitution. This would achieve the result of a contract which is formed after the passage of a statute rendering the statute void as against the Contracts clause. Surely this cannot be the case.

In addition, if there were a doubt about whether the contract really should be subject to a pre-existing law, one need only to look to the Supreme Court for the answer:

III

In sum, I believe that the actions of the City with respect to the shortfall in funds were authorized by the plain words of section 9(a) of the Budget Reconciliation Act of 1992 as to the police union. As to both the police union and the teachers' union, I believe the plain words of the City Charter

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> But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise, not only out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, or nations, or of the community to which the parties belong; they are always presumed, to be known and recognized by all, are binding upon all, and need never therefore be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.

Long Island Water Supply Co. v. City of Brooklyn, 166 U.S. 685, 692 (1897). The above-quoted passage is also quoted in *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 435-36 (1934), on which the majority relies.

apply and give the City the authority to do just what it did. I see no reason to depart from the language of Section 9(a) of the statute and the Charter, each of which is quite clear, I think.

I do not think there is any impairment of a contract in the constitutional sense because the actions taken by the City were authorized by the statutory and charter provisions I have quoted above. Whether there is any cause of action under state law is a question on which I express no opinion.

FILED: October 8, 1993

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-2234(L)
(CA-92-440-Y)

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO; THE CITY UNION OF BALTIMORE, AMERICAN FEDERATION OFTEACHERS, LOCAL 800, AFL-CIO,

Plaintiffs - Appellees,

versus

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, Individually and in his capacity as Mayor and Member of the Board of Estimates of Baltimore City; MARY PAT CLARKE, Individually and in her capacity as President of the Baltimore City Council and Member of the Board of Estimates of Baltimore City; JACQUELINE F. MCLEAN, Individually and in her capacity as Comptroller and

Member of the Board of Estimates of Baltimore City; NEAL JANEY, In his capacity as Member of the Board of Estimates of Baltimore City; GEORGE F. BALOG, Individually and in his capacity as Member of the Board of Estimates of Baltimore City; BOARD OF ESTIMATES OF BALTIMORE CITY,

Defendants - Appellants.

No. 92-2237
(CA-92-440-Y)

In Re: STATE OF MARYLAND,

Appellant,

versus

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO; THE CITY UNION OF BALTIMORE, AMERICAN FEDERATION OFTEACHERS, LOCAL 800, AFL-CIO,

Plaintiffs - Appellees,

versus

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, Individually and in his capacity as Mayor and Member of the Board of Estimates of Baltimore

City; MARY PAT CLARKE, Individually
and in her capacity as President of
the Baltimore City Council and Member
of the Board of Estimates of Baltimore
City; JACQUELINE F. MCLEAN, Individually
and in her capacity as Comptroller and
Member of the Board of Estimates of Baltimore
City; NEAL JANEY, In his capacity as Member
of the Board of Estimates of Baltimore City;
GEORGE F. BALOG, Individually and in his capacity
as Member of the Board of Estimates of Baltimore
City; BOARD OF ESTIMATES OF BALTIMORE CITY,

Defendants - Appellants.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appellees Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO and the City Union of Baltimore, American Federation of Teachers, Local 800, AFL-CIO have filed a petition for rehearing with suggestion for rehearing in banc and appellants filed an answer to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judge Murnaghan voted to rehear the case in banc. Chief Judge Ervin, Judges Russell, Widener, Hall, Phillips, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig and Williams voted against rehearing in banc.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with

suggestion for rehearing in banc.

Entered at the direction of Judge Luttig for a panel consisting of Judge Widener, Judge Luttig and Judge Voorhees, Chief United States District Judge, sitting by designation.

For the Court

/s/ Bert M. Montague
Clerk

FILED: October 12, 1993

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-2234(L)
(CA-92-440-Y)

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO; THE CITY UNION OF BALTIMORE, AMERICAN FEDERATION OFTEACHERS, LOCAL 800, AFL-CIO,

Plaintiffs - Appellees,

versus

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City; NEAL JANEY, In his capacity as Member of the Board of Estimates of Baltimore City; GEORGE F. BALOG, Individually and in his capacity as Member of the Board of Estimates of Baltimore City; BOARD OF ESTIMATES OF BALTIMORE CITY,

Defendants - Appellants.

No. 92-2237
(CA-92-440-Y)

In Re: STATE OF MARYLAND,

Appellant,

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BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO; THE CITY UNION OF BALTIMORE, AMERICAN FEDERATION OF TEACHERS, LOCAL 800, AFL-CIO,

Plaintiffs - Appellees,

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MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, Individually and in his capacity as Mayor and Member of the Board of Estimates of Baltimore

City; MARY PAT CLARKE, Individually
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City; JACQUELINE F. MCLEAN, Individually
and in her capacity as Comptroller and
Member of the Board of Estimates of Baltimore
City; NEAL JANEY, In his capacity as Member
of the Board of Estimates of Baltimore City;
GEORGE F. BALOG, Individually and in his capacity
as Member of the Board of Estimates of Baltimore
City; BOARD OF ESTIMATES OF BALTIMORE CITY,

Defendants - Appellants.

AMENDED
On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appellees Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO and the City Union of Baltimore, American Federation of Teachers, Local 800, AFL-CIO have filed a petition for rehearing with suggestion for rehearing in banc and appellants filed an answer to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judge Murnaghan voted to rehear the case in banc. Chief Judge Ervin, Judges Russell, Widener, Hall, Phillips, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig and Williams voted against rehearing in banc.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Luttig for a panel consisting of Judge Widener, Judge Luttig and Judge Voorhees, Chief United States District Judge, sitting by designation. Judge Murnaghan filed the attached dissent.

For the Court

/s/ Bert M. Montague
Clerk

MURNAGHAN, J., dissenting from denial of petition for rehearing en banc:

I have, albeit unsuccessfully, voted for rehearing en banc and dissent from its denial.

The case involves negotiations whereby members of the Baltimore City police department and public school teachers of the same municipality worked out agreements as to wages with City representatives, subject to recommendation by the City's Board of Estimates and adoption by the City Council in the annual budget. Said recommendation by the Board of Estimates and adoption by the City Council occurred.

During the year involved, there was a shortfall in expected revenue. The State of Maryland reduced its appropriation to the City. The City moved to remain within balanced budget requirements and decided not to honor in all respects the contractual promises made to the police and to the teachers. Two of the three members of the panel rendering the decision which I have wished should be reheard en banc

constituted the majority and decided that a substantial impairment of contract resulted from the consequent reduction in salary paid from what had been promised.

The constitutional proviso against impairment of contract, U.S. Const. art. I, § 10 , cl. 1 ("No State shall ... pass any ... Law impairing the Obligation of Contracts . . . ."), applies to a corporate municipality such as Baltimore City. See Northern Pac. Ry. Co. v. Minnesota, 208 U.S. 583, 590 (1908) (stating that it is not "open to question" that the Contract Clause applies to municipal legislation). Substantial contract impairment by a state or municipality is permissible only if 1) reasonable and 2) necessary. See United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977) (holding that the Contract Clause prohibits a substantial impairment of a contractual relationship unless the impairment "is reasonable

and necessary to serve an important public purpose"). [1]

The panel majority determined that deference should be accorded to the Board of Estimates, which ordered the reduction in pay (i.e., breaches of contract), treating such orders as legislative in nature although the City Council did not make or approve them. The fact that the Board of Estimates engages somewhat in what amounts to part of the legislative process, and therefore has freedom from the obligation to testify, see Baker v. Mayor and City Council of Baltimore, 894 F.2d 679, 682 (4th Cir. cert. denied, 498 U.S. 815 (1990),

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[1] In defending the supposed "reasonableness" of the city's salary reductions, the panel incorrectly asserted that "Baltimore's plan ... extended to all City employees" and thus constituted a generally applicable rule untainted by any "special interest character." Slip Op. at 17 (emphasis added) (citation and internal quotation marks omitted). But, as the opinion elsewhere acknowledged, the plan did not apply to "firefighters, who enjoy certain privileges." *Id.* at 5.

Moreover, a truly general impairment of contract applying exclusively to injure employees, would still be, in a monetary sense, for the benefit of the employer, the City.

does not elevate its steps to the dignity of actual legislation. But whether the breach of contract was legislative or not, it was not proper, in any event, as legislation. The pay reduction impairing contractual undertakings was an improper abdication of the responsibility to see that the federal constitution is complied with. The City should have considered several items in the budget which could have been cut, without any impairment of contract occurring, thereby insuring that the budget would be balanced. Besides issuance of bonds, reduction of support for cultural institutions comes immediately to mind. The City, disliking such cuts, even though they would not represent breaches of contract, could alternatively impose taxes to meet the reduction in state revenues allocated to the City which would be at a level not equaling the highest level reached by the City in the past.

What was done was by no means necessary. Its reasonableness is quite dubious. At most, it minimized somewhat the political dissatisfaction of Baltimore voters which

could be expected by City Council members if funding for cultural activities were reduced or taxes were raised. The pay reduction, though it clearly impaired the obligation of contract, could only benefit the political interest of City Council members who regularly must run for reelection. To avoid what politics would have rendered unpopular, Baltimore City chose to ignore, that is to break, contracts and thereby to interfere quite unfavorably with the bargained rights, namely the livelihood of important city workers, the police and public school teachers. See Association of Surrogates & Supreme Court Reporters v. New York ("Surrogates I"), 940 F.2d 766, 773 (2d Cir. 1991) ("In fact, the [scheme at issue here] smacks of the political expediency that United States Trust Co. warned of: 'A governmental entity can always find a use for extra money, especially when taxes do not have to be raised."' (quoting United States Trust Co., 431 U.S. at 26)), cert. denied, 112 S. Ct. 936 (1992); cf. Association of Surrogates & Supreme Court Reporters v. State ("Surrogates II"), 79

N.Y.2d 39, 47, 588 N.E.2d 51, 54, 580 N.Y.S.2d 153, 156 (1992) (noting that the deferral of state employees' salaries was "not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and the other necessities of life"). The two-member panel majority opinion infringes on the holdings in Condell v. Bress, 983 F.2d 415, 419-20 (2d Cir.) (holding that a December 1990 statute deferring state employees' salary payments violated the Contract Clause because it was not reasonable and necessary to further an important public purpose), cert. denied, 113 S. Ct. 1849 (1993); "Surrogates I", 940 F.2d at 773 (holding that a May 1990 statute deferring state employees' salary payments was "in no way 'necessary' to the achievement of the [state legislature's] stated goals"); "Surrogates II", 79 N.Y.2d at 46 (holding unanimously that a 1991 statute deferring state employees' salary payments was not "reasonable and necessary to accomplish the State's purposes"); and Carlstrom v. State, 103 Wash.2d 391, 396-97, 694 P.2d 1, 5-6 (1985) (holding

unanimously that a state statute canceling teachers' contractual salary increases violated the Contract Clause because it was not reasonable). See also Opinion of the Justices, 135 N.H. 625, 636, 609 A.2d 1204, 1211 (1992) (concluding unanimously that a "furlough" bill requiring certain state employees to take unpaid leave would violate the Contract Clause because it would be "neither reasonable nor necessary to serve an important public purpose"); cf. Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal.3d 296, 313-14, 591 P.2d 1, 10-11, 152 Cal. Rptr. 903, 912-13 (1979) (holding that a state statute capping local governmental employees' contractual cost-of-living wage increases violated the Contract Clause because the state's supposedly "grave fiscal crisis" did not actually constitute a significant and legitimate public purpose).

There is thus substantial authority, federal and state, appearing to contradict the opinion of the two-judge panel majority. A conflict of circuits emerges on an item of

potentially immense importance. Accordingly, I dissent from the denial of en banc rehearing.

/s/ Francis D. Murnaghan, Jr.
Francis D. Murnaghan, Jr.
United States Circuit Judge

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another

State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

SENATE BILL No. 34

(11r6082)

ENROLLED BILL

Introduced by **The President**

Read and Examined by Proofreaders:

_____

Proofreader.

_____

Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this __ day of _____ at _____ o'clock, __ M.

_____

President.

CHAPTER_____

AN ACT concerning

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

Strike out indicates matter stricken from the bill by amendment or deleted from the law by amendment.

Italics indicate opposite chamber/conference committee amendments.

FOR the purpose of authorizing the Governor for Fiscal Year 1992 to reduce certain appropriations for certain State aid to the counties and Baltimore City; requiring for Fiscal Year 1992 certain local entities to pay for certain local employee retirement and social security costs; providing for the allocation of certain appropriations reductions among the counties and Baltimore City; *authorizing the counties and Baltimore City and certain governmental units, subject to certain conditions, to take certain actions to meet their fiscal obligations under this Act*; providing that, for a certain period, certain payments under the General Public Assistance Program and the Aid to Families with Dependent Children Program shall be at certain levels; requiring the District Court and circuit courts to impose an additional court cost on certain criminal defendants in Fiscal Year 1992; prohibiting the court from waiving certain costs unless the defendant establishes indigency; requiring that certain funds be remitted to the Comptroller and credited to the General Fund; authorizing the Commissioner of Correction to deduct certain costs from certain inmate accounts; authorizing the Maryland Legal Services Corporation, for Fiscal Year 1992, to transfer certain funds to the Office of Public Defender to defray operating expenses of the Office; authorizing the State Department of Education in coordination with the Department of Public Safety and Correctional Services to employ, and change the employment status of, teachers and librarians in correctional educational programs on a 10-month per year basis; providing for the effective date of this Act; and generally relating to reconciliation of the State Budget for the 1992 Fiscal Year.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) Notwithstanding any other provision of law including Chapter 470 of the Acts of the General Assembly of the Regular Session of 1991, and in addition to the authority granted under § 7-213 of the State Finance and Procurement Article, for Fiscal Year 1992 only, the appropriations made by the laws of the State may be reduced by the Governor with the approval of the Board of Public Works as provided below:

(1) (i) In addition to the limitations on the State's social security contributions for Fiscal Year 1992 as set out in Section 9 of Chapter 470 of the Acts of the General Assembly of the Regular Session of 1991, $995,841 in reduction of total State aid for local employees' fringe benefits for employer social security contributions as provided under §§ 5-202(d) and 23-403(c) of the Education Article, to be allocated among the counties and Baltimore City as set out in subsection (b) of this section, and notwithstanding any other law or agreement, the balance of any required employer social security contribution for Fiscal Year 1992 only shall be the obligation of the Board of Education, the Mayor and City Council of Baltimore or the Board of Library Trustees who pays the compensation of the employee; and

(ii) $19,165,725 in reduction of total State aid for local employees' fringe benefits for retirement, as provided under Article 73B, § 162 of the Code for members of the Teachers' Retirement System and the Pension System for Teachers whose compensation is paid by a board of education, the Mayor and City Council of Baltimore or Board of Library Trustees and under Article 73B, §§ 89(4), 102, and 150(4) of the Code, to be allocated among the counties and Baltimore City as set out in subsection (b) of this section; and

(2) In addition to any reductions made under the authority of § 7-213 of the State Finance and Procurement Article, $48,159,919 in reduction of total State aid for grants to counties, as provided under Article 24, § 9-801 of the Code, to be allocated among the counties and Baltimore City as set out in subsection (b) of this section.

(b) The State aid reductions under this section shall be allocated among the counties and Baltimore City as follows:

County	Social Security - Education	Social Security - Libraries	Retirement - Education
Allegany	$ 12,676	$ 445	$ 241,779
Anne Arundel	86,438	5,548	1,723,827
Baltimore City	128,375	8,489	2,439,269
Baltimore	127,785	11,175	2,590,162
Calvert	11,405	230	226,383
Caroline	4,680	911	104,115
Carroll	24,565	2,226	501,840
Cecil	14,508	43	290,441
Charles	21,131	332	423,034
Dorchester	5,146	189	121,932
Frederick	31,504	797	619,568
Garrett	5,925	419	118,449
Harford	32,337	2,302	691,082
Howard	44,320	2,914	862,186
Kent	2,973	709	66,797
Montgomery	175,816	10,216	3,520,650
Prince George's	135,298	7,918	2,810,958
Queen Anne's	7,191	27	133,297
St. Mary's	13,200	636	281,200
Somerset	3,696	16	75,833

Talbot	5,442	0	107,004
Washington	20,858	1,456	427,570
Wicomico	14,765	819	290,812
Worcester	7,990	0	155,476
TOTAL	938,024	57,817	18,823,664

County	Retirement - Libraries	Grants to Counties
Allegany	$ 2,553	$ 479,358
Anne Arundel	38,196	6,083,544
Baltimore City	60,850	2,150,215
Baltimore	73,530	7,197,347
Calvert	3,529	871,511
Caroline	3,050	222,564
Carroll	15,718	1,593,192
Cecil	3,164	775,671
Charles	3,868	1,242,570
Dorchester	1,919	342,299
Frederick	5,592	2,217,497
Garrett	1,162	389,705
Harford	16,239	1,768,835
Howard	25,377	3,224,926
Kent	1,294	280,300
Montgomery	0	6,293,317
Prince George's	62,066	6,983,760
Queen Anne's	1,927	597,377
St. Mary's	3,457	865,208
Somerset	850	190,032
Talbot	1,978	809,723
Washington	7,699	1,241,650
Wicomico	5,883	805,575
Worcester	2,160	1,533,743
TOTALS	342,061	48,159,919

(c) The amount of any reduction made under the provisions of subsection (a)(1) of this section shall be credited to the General Fund of the State instead of the General State School Fund.

SECTION 2. AND BE IT FURTHER ENACTED, That notwithstanding any other provision of law, if State aid for retirement is reduced in accordance with Section 1 of this Act or § 7-213 of the State Finance and Procurement Article, the balance of the required retirement contributions for Fiscal Year 1992 only, otherwise payable by the State under Article 73B, §§ 89(4), 102, 110, 150(4), and 162 of the Code, shall be the obligation of each board of education, the Mayor and City Council of Baltimore, Board of Library Trustees or Board of Community College Trustees and shall be paid by each board or the Mayor and City Council of Baltimore in a manner prescribed by the Board of Trustees of the Maryland State Retirement and Pension Systems. The Board of Trustees shall have the powers set forth in Article 73B, § 167(g) of the Code to collect the amounts due from each board or the Mayor and City Council of Baltimore.

SECTION 3. AND BE IT FURTHER ENACTED, That, notwithstanding any other provision of law and in addition to the limitations on the State's social security contributions for Fiscal Year 1992 as set out in Section 9 of Chapter 470 of the Acts of the General Assembly of the Regular Session of 1991, for any reduction in State aid for the State share of employer social security contributions for community colleges made under the authority of § 7-213 of the State Finance and Procurement Article, the balance of any required employer social security contribution shall be the obligation of the Board of Community College Trustees who pays the compensation of the employee.

SECTION 4. AND BE IT FURTHER ENACTED, That, notwithstanding any other provision of law and in addition to any amounts authorized to be transferred to the Office of Public Defender in Fiscal Year 1992 by the Maryland Legal Services Corporation prior to the effective date of this Act, for Fiscal Year 1992, the Maryland Legal Services Corporation may pay $750,000 from the funds received from the Interest on Lawyers Trust Account program, as provided by Section 10-303 of the Business Occupations and Professions Article of the Annotated Code of Maryland, to the Office of Public Defender to defray operating costs of the Office. The funds transferred to the Office of Public Defender under this section may be used for any costs of the office authorized by law and are not limited to cases involving a child in need of assistance. These funds may be made available to the Office of Public Defender by approved budget amendment.

SECTION 5. AND BE IT FURTHER ENACTED, That, notwithstanding any other provision of law, for Fiscal Year 1992, in every case in which a defendant is found guilty, enters a plea of guilt or nolo contendere, or is given probation before judgment for an offense under the Motor Vehicle Law that is punishable by imprisonment or for any other criminal offense, including cases in which the defendant is represented by the Office of Public Defender, the District Court and the circuit courts shall require the defendant to pay an additional court cost of $5. The court cost imposed under this section shall be in addition to any other court costs imposed in the District Court and circuit courts. For Fiscal Year 1992, the court may not waive any court cost including the court cost imposed under this section unless the defendant establishes indigency as provided in the Maryland Rules. The funds collected under this section shall be remitted to the Comptroller and credited to the General Fund.

SECTION 6. AND BE IT FURTHER ENACTED, That, notwithstanding any other provision of law:

(a) If any court cost, including the court cost imposed under Section 5 of this Act, is waived due to indigency and the individual is committed to the custody of the Division of Correction, the Commissioner of the Division of Correction shall deduct the court cost from the individual's financial accounts established under Article 27, § 678B of the Code or from any other account held by the Commissioner on behalf of the individual.

(b) The deduction under this section is in addition to any other deductions required or fees collected from inmate accounts provided for under the Code.

(c) The Commissioner of the Division of Correction shall adopt regulations to implement this section in accordance with the provisions of Article 27, § 678B of the Code.

SECTION 7. AND BE IT FURTHER ENACTED, That, notwithstanding any other provision of law, from December 1, 1991 through June 30, 1992, payments for the General Public Assistance Program and payments for the Aid to Families with Dependent Children Program of the Income Maintenance Administration of the Department of Human Resources shall be equivalent to the payment level in effect on June 30, 1989.

SECTION 8. AND BE IT FURTHER ENACTED, That the State Department of Education is authorized, in coordination with the Department of Public Safety and Correctional Services, to employ teachers and librarians for authorized positions in educational programs within correctional institutions under Title 22, Subtitle 1 of the

Education Article on a 10-month per year basis and to change the employment status of teachers and librarians currently employed on a 12-month per year basis to a 10-month per year basis in order to restrain program costs.

SECTION 9. AND BE IT FURTHER ENACTED, That, notwithstanding any other provision of law or any contractual provision, for Fiscal Year 1992 only:

(a) Subject to the provisions of subsection (b) of this section, the Governing body of a county or Baltimore City, or other legal entity or authority within the county or Baltimore City, may take any action necessary, including any action to reduce a previously approved appropriation, to prudently manage its fiscal affairs and to meet its obligations under this Act. This subsection may not be interpreted to authorize additional taxation authority.

(b) Any reduction to appropriations for a county board as defined in § 1-101 of the Education Article authorized by subsection (a) of this section may not eliminate any position responsible for classroom instruction or reduce funds supporting related instructional materials and equipment.

SECTION ~~8.~~ 9 *10.* AND BE IT FURTHER ENACTED, That this Act shall take effect October 14, 1991.

Approved:

_____

Governor.

_____

President of the Senate.

_____

Speaker of the House of Delegates.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND STATE TEACHERS ASSOCIATION, INC., et al.

Plaintiffs

vs. CIVIL ACTION NO. MJG-93-311

WORCESTER COUNTY,MARYLAND, et al.

Defendants

* *

ORDER STAYING AND ADMINISTRATIVELY CLOSING CASE

It appears that the future course of this case may be significantly affected if the Supreme Court were to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit with regard to its decision in Baltimore Teachers Union v. Mayor of Baltimore, --- F.3d ---, 1993 WL 345859 (4th Cir. 1993). It further appears that there is no reason for this case to remain in active and open status provided that it can be reopened if, and when, necessary without adverse effect upon the rights of any party hereto.

Accordingly,

1. This case is STAYED pending Supreme Court resolution of Baltimore Teachers Union v. Mayor of Baltimore, --F.3d --- (4th Cir. 1993), for which a petition for a writ of certiorari is to be filed.

2. The parties may engage in arbitration, administrative proceedings, or other actions to resolve this case during the pendency of this stay.

3. The Clerk of the Court shall ADMINISTRATIVELY CLOSE this case for possible reopening pursuant to further Order of this Court upon the application (by December 31, 1994) of any party hereto based upon Supreme Court resolution of Baltimore Teachers Union v. Mayor of Baltimore or any other reasons.

4. The administrative closing of this case shall not affect any rights of the respective parties in this, or any other, proceeding.

5. The Clerk of the Court shall send copies of this Order to all parties or their counsel of record.

SO ORDERED this 17th day of November, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND STATE TEACHERS
ASSOCIATION, INC., et al.

Plaintiffs

vs. CIVIL ACTION NO. MJG-93-311

WORCESTER COUNTY,MARYLAND,
et al.

Defendants

* *

MEMORANDUM AND ORDER

The Court has before it Defendant Board of Education of Worcester County's Motion to Dismiss, or Alternatively, for Summary Judgment and the Motion to Dismiss of Defendant Worcester County. The Court has reviewed the legal memoranda submitted by the parties and has had the benefit of a hearing on these matters.

I. LEGAL STANDARD

The burden a defendant must carry in order to prevail

on a Motion to Dismiss is an onerous one. See Fed. R. Civ. P. 12(b). When evaluating a motion to dismiss a complaint, all well-pleaded allegations must be accepted as true and the pleading must be construed in a light most favorable to the plaintiff. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 1356 at 296; § 1357 at 304 (1990). The court should not dismiss the claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 4546 (1957).

II. FACTUAL BACKGROUND

This controversy involves the furloughing of teachers in Worcester County, Maryland -- without pay -- for a period of five days in 1992.

On March 19, 1991, the Worcester County Teachers' Association (the WCTA") and the Board of Education of Worcester County (the "Board") entered into a collective

bargaining agreement (the "Contract") for the 1991-1992 school year. The Contract set forth the salaries teachers would be paid based on factors such as length of service and educational credentials. Another section of the agreement provided that teachers would work 188 days. After it was signed, Worcester County (the "County") appropriated the funds necessary to pay the salaries provided for by the Contract.

On December 31, 1991, in anticipation of a decrease in State aid and County revenues, the County Commissioners cut $740,000 from the salaries to be paid to school employees in the County for the 1991-1992 year. In a letter dated January 6, 1992, the County informed the Board that "it would be necessary for the Board of Education to reduce salary expenditures by $740,000. While the letter did not mandate a method for so doing, it strongly suggested -- by reference to its own budget-reduction actions in other areas -- that a furlough system be imposed on teachers.

On January 21, 1992, the Board reduced the remaining work year for all teachers covered by the Contract by five days and reduced their salaries by a proportionate amount. In October of 1992, the Board, after a year-end audit, paid the teachers for one of those five days. Therefore, the teachers' pay was, in effect, four days short.

The Plaintiffs allege that the furloughs and salary reductions were not necessary to balance the Fiscal Year 1992 budget; that other adjustments could have been made to preserve a balanced budget without cutting teacher salaries. They claim this reduction in salaries firmly established by the collective bargaining agreement between the Board and the WCTA was a substantial impairment of the contract, giving rise to a cause of action under Section 1983 and the Contract Clause of the United States Constitution. U.S. Const. art. I, 10, cl.1; 42 U.S.C. 1983 (1981).

III. DISCUSSION

A. The Board

The Board has moved for dismissal or summary judgment on the grounds that (1) it is immune from suit in federal court by virtue of the Eleventh Amendment; (2) there was no actionable "impairment" of the Contract; (3) this dispute is subject to arbitration; (4) the dispute is not ripe and the Plaintiffs have not exhausted their state administrative remedies.[1]

1. Eleventh Amendment Immunity

The Eleventh Amendment[2] bars suits "by private parties seeking to impose a liability which must be paid from

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[1] The duty to arbitrate and exhaustion arguments are briefly addressed -- and rejected -- below, in the discussion of the County's Motion.

[2] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Since Hans v. Louisiana, 134 U.S. 1 (1890), it has been held to bar suits in federal court by citizens against their own state.

public funds in the state treasury." Edelman v. Jordan, 415 U.S. 651, 663 (1974). In the present case, the Board would be immune if the State of Maryland was the "real, substantial party in interest." Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 464 (1945). A suit against a government entity may meet this test where that entity is an arm or the alter ego of the State. See Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977); Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n, 822 F.2d 456, 457 (4th Cir. 1987). The determination of whether the entity is in fact an arm of the State "depends, at least in part, upon the nature of the entity created by state law." Mt. Healthy, 429 U.S. at 280.

The Fourth Circuit has suggested four factors to evaluate in determining whether an entity should be considered an arm of the State: (1) whether the judgment will be paid out of the state treasury; (2) the entity's degree of autonomy from the state; (3) whether local or statewide issues are at stake; and (4) how the entity is treated under state law. Ram Ditta, 822

F.2d at 457-58. The Ram Ditta court noted that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded.' Id. at 457. After finding, inter alia, that state funds were not threatened by a verdict against the defendant, the court refused to grant immunity. See id. at 458 ("At no time, however, is it contemplated that the state treasury will be used to pay a judgment.").

The recent decision in Bockes v. Fields, 999 F.2d 788 (4th Cir. 1993), considerably narrowed the immunity test. In Bockes, the Fourth Circuit warned that [w]hen the action seeks damages that would be satisfied by state funds, ... no further inquiry is necessary." Id. at 791. Where the state's share would not constitute "a substantial portion" of the total liability, however, further analysis may be required. See id. at 790; Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940, 945 (7th Cir. 1986) (rejecting a school board's claim of immunity premised only on the assertion that some "state aid

may find its way into the plaintiffs' pockets").

a. Effect on State Treasury. County boards of education in Maryland receive a significant amount of their funds from the State of Maryland. For Fiscal Year 1993, the State of Maryland originally appropriated approximately 1.9 billion dollars to go to local Boards of Education.[3] Although the record is barren of evidence, the Board suggests this figure represents approximately half of all school funds in Maryland. The other portion of the Board's funds come from the County. The Board has no independent taxing authority and, therefore, no other way to obtain funds. Contra Mt. Healthy, 429 U.S. at 280 (noting that, in Ohio, local school boards have authority to issue bonds and levy taxes).

The Board's dependence on state funding does not

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[3] A portion of this amount was later reduced, contributing, in part, to the anticipated shortfalls that precipitated the actions underlying this suit.

conclude the analysis.[4] Under Md. Code Ann., Educ. § 5-202(b) (1992), the State's payment to the County is based upon a complicated formula that ultimately sets the State contribution as the difference between the "basic current expenses to be shared" calculated under § 5-202(b)(2) and "the county share" determined under § 5-202(b)(3), which is a minimum amount a County must appropriate to its schools in order to receive the State funds. From the evidence before the Court at present, it is unclear whether payment of a judgment against the Board would increase the State's payment to the County for education expenses under this formula.

The Board has argued that the funds it receives from the State and County are hopelessly intermingled within its budget and, therefore, any judgment will inevitably be paid with State money. However, the Board prepares its own budget

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[4] Courts have held that the mere receipt of state funds does not bestow Eleventh Amendment immunity upon an inferior government entity. See Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21, 27 (2nd Cir. 1986).

-- albeit under State and County guidance -- and consequently has some degree of flexibility with regard to allocation of funds. Id. § 5-101.[5] Without additional evidence regarding the Board's ability (or inability) to "unmix" the funds and the existence (or nonexistence) of Board accounts that do not include a "substantial portion" of State dollars, see Bockes,

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[5] Additional provisions of the Code suggest that there are ways to ensure that a judgment would not be paid with State funds. The Board is able, with the County's approval, to transfer funds from one area of its budget to another. Md. Code Ann., Educ. § 5-105(c) (1992). Thus, it may be able to reorganize its budget to segregate County and State funds. The County is allowed to "provide funds that are more than the amount required by § 5-202 of this title to support improved and additional programs." Id. § 5-103(c). Thus, the Board may be able to obtain County funds to cover its potential liability.

It can be expected that the Board and County would resist these measures. But see Love v. Bachman, 383 A.2d 404, 408 (Md. App. 1978) (holding that a contractant had standing to enforce a judgment against a school board by writ of mandamus against the county, which had denied appropriated funds to the board); Md. Code Ann., Educ. § 5 6-301(i) ("The county commissioners, county council, and Mayor and City Council of Baltimore City shall levy sufficient funds to meet the schedule of salaries established under this section.").

999 F.2d at 790, this Court is unable to determine whether the State treasury is placed in jeopardy by this dispute.[6]

b. Autonomy. The State exercises a significant degree of control over local school boards in matters ranging from educational policy to budgetary guidelines. All members of the Board are appointed by the Governor of Maryland. Md. Code Ann., Educ. § 3-108(a) (1992). School budgets receive significant funds from the State and are subject to State guidelines and audits. Id. §§ 5-101, -102, -108, & -202. State law sets minimum salaries for teachers. Id. § 6-301. And, the State is able to withhold funds whenever it finds a local board to be out of compliance with "the provisions of the State program of public education," effectively halting the board's

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[6] Factually, and possibly conceptually, the Bockes decision is distinguishable from the dispute before this Court. In Bockes, the potential liability would have been paid directly from a state insurance fund. 999 F.2d at 790. In the present case, a judgment against the Board would be paid, at best, only indirectly from state funds, as that money will pass through County hands and ultimately be incorporated into the Board's budget.

operations. Id. § 5-205.

On the other hand, county boards set their own curriculum guides and courses of study, subject to State guidelines. Id. § 4-110(a). Local boards can sue and be sued on their own behalf. Id. § 3-104. It is undisputed that they may enter into valid and binding employment contracts. County boards are required to carry their own comprehensive liability insurance. Id. § 4-105. Finally, boards set their own budgets, subject to county and State guidelines and minimums. Id. § 5-101.

Considering the pervasive influence of the State on local school boards, even in areas in which boards may exercise significant discretion, the autonomy factor must be viewed to weigh in favor of immunity. In this light, the present dispute is factually distinguished from Ram Ditta, as the State neither appointed members of nor financed the defendant park commission in that case. See 822 F.2d at 458-59. Such independence cannot be attached to the Board in this case.

c. Local or Statewide Concern. Education policy and funding is certainly a matter of statewide concern. To dump the entire Education Article of the Maryland Code into this dispute, however, would be to grossly mischaracterize what is essentially a local contract dispute between the Board and the WCTA. While the State has established minimum salaries for teachers, counties may pay teachers more, see Md. Code Ann., Educ. § 6-301(g), as was done though the Contract. While State funding cuts were certainly the underlying cause of the furlough program, exactly how to respond to the budget crisis (e.g., by cutting services, raising taxes, furloughing employees, etc.) was left to the discretion of the County and Board. At bottom, this dispute concerns Worcester County and its school teacher-employees. It is a local matter.

d. Treatment under State Law. Maryland courts generally have treated county school boards as state agencies. See Montgomery County Educ. Ass'n v. Board of Educ., 534 A.2d 980, 987 (Md. 1987); Board of Educ. v. Prince George's

County Educator's Ass'n, 522 A.2d 931, 936 n.3 (Md. 1987). That treatment convinced Judge Young to find local school boards immune from suit in federal court in Jones v. Frederick County Bd. of Educ., 689 F. Supp. 535 (D.Md. 1988). Because the present dispute involves the board as a party to a contract -- and not as a tortfeasor, as in Jones -- and because of this Court's detailed re-examination of the issue, Jones does not resolve the question in this case.

Under Maryland statutes, school boards are granted some measure of sovereign immunity. See Md. Code Ann., Educ. § 4105(d) (1992); Md. Code Ann., Cts. & Jud. Proc. § 5-353 (Supp. 1993). These provisions, however, seemingly focus upon potential liability in tort. In contract actions, the State and its agencies have apparently waived their immunity. See Md. Code Ann., State Gov't § 12-201 (1993) ("[T]he State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract.").

As the Fourth Circuit has noted, "questions of eleventh amendment immunity are ultimately governed by federal law.' Ram Ditta, 822 F.2d at 459-60. In the present context, state law suggests that local school boards act, in some instances, as agents of the State and enjoy some measure of sovereign immunity. Maryland law, however, is far from conclusive on these points. For Eleventh Amendment purposes, therefore, this factor cannot be dispositive.

e. Conclusion. Considering all the evidence in a light most favorable to the Plaintiffs, the immunity issue remains in doubt. It must be noted, however, considering the present stage of the litigation, the Court is unable to conclude that a judgment against the Board would inevitably result in substantial state funds paid to the Plaintiffs. For this reason, and because of the high importance placed on that factor by the Bockes court, this Court will reserve judgment on immunity until Plaintiffs have had time to conduct discovery on that issue and additional evidence can be presented.

2. Impairment of Contract

With regard to the Contract Clause issue, the Court is compelled to follow the analysis provided by the recent Fourth Circuit decision in Baltimore Teachers Union v. Mayor of Baltimore, --- F.3d ---, 1993 WL 345859, reh'g denied, --- F.3d --, 1993 WL 406566 (4th Cir. 1993). To resolve a Contract Clause dispute, courts must conduct a three-pronged analysis, evaluating (1) whether a contract was impaired; (2) whether the impairment was substantial; and (3) "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers." Id. at *2. See United States Trust Co. v. New Jersey 431 U.S. 1 (1977). Deferring to the Fourth Circuit, as this Court must, there can be no finding that the Board's actions constituted an unconstitutional impairment of the Contract.

a. Impairment and Substantiality. Based on the Baltimore Teachers ruling, as well as the nearly identical facts in the present case, it is clear that the Contract was impaired

and that the impairment was substantial. The Contract was impaired because, after a final agreement was reached and after funds were appropriated to satisfy that agreement, the Board unilaterally modified the terms. See Baltimore Teachers, 1993 WL 345859, at *2-3. The impairment was substantial because the right impaired -- "the right to compensation at the contractually specified level" -- was "one that induced the parties to enter into the contract and upon the continued existence of which they have especially relied." Id. at *4.

This Court cannot find, to the contrary, that either the terms of the agreement or the existing law permitted the Board to act as it did. Nothing in the Contract provisions cited by the Board can be construed to permit the unilateral reduction of teachers' salaries. Article III expressly conditions the Board's rights on the "terms and conditions of [the] agreement"; Article IX refers to layoffs; and Article VIII refers to disciplinary matters, not across-the-board pay cuts.

Article XX, the key provision in the Board's argument, addresses the consequences of the County's failure to initially budget enough to cover the salaries and cannot reasonably be read to leave the compensation terms of the Contact open indefinitely. See Billmyre v. Sacred Heart Hosp. of the Sisters of Charity, Inc., 331 A.2d 313, 316 (Md. 1975) ("When the language of a contract is clear, the true test of what is meant is .. what a reasonable person in the position of the parties would have though it meant.").

As to why this Court finds that Maryland law cannot be read to permit unilateral modification of the Contract, the Baltimore Teachers majority is particularly instructive:

> If the Neall Amendment were read to authorize any contravention of contractual terms, as the concurrence would read it, it is doubtful that there ever existed (or ever could exist) a contract between the City and its employees, because there would have been a failure of mutual obligation. More importantly, even assuming such a failure were not fatal to contract formation, the Amendment, so read,

> would almost certainly violate the Contract Clause itself.

Id. at *3 n.5. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."); Davis v. State, 451 A.2d 107, 111 (Md. 1982) (reiterating that Maryland courts are to interpret statutes to avoid questions of constitutionality, if reasonably possible). Additionally, in Love v. Bachman, 383 A.2d 404 (Md. App. 1978), a case involving a contract dispute between a school board and an architect, the Maryland Court of Special Appeals held that "contract rights were inferentially established at a time when the Board was authorized to act, after the County Council carried into effect the conditional capital budget approval. . . ." Id. at 410 (warning that a budget cut "could not constitutionally, and did not by its own terms, impair the

obligation of what is asserted as a valid, binding, subsequently performed, contract").

b. Important Public Interest. This Court is bound by the reasoning of Baltimore Teachers in determining whether the substantial impairment at issue was "reasonable and necessary to serve an important public interest." United States Trust, 431 U.S. at 25. Although the Baltimore Teachers decision notes that complete deference to legislative judgments is not appropriate when a public contract is impaired, see 1993 WL 345859, at *5 (citing United States Trust, 431 U.S. at 26, and noting the inherent self-interest problem), the test it establishes leaves this Court no alternative but to defer to the Defendants' decision when the county faces a financial crisis. See id. at *4 (finding that "ensuring the financial integrity of the City is a significant public purpose").

Under the Baltimore Teachers standard, the task of the court is limited to ensuring that

states neither "consider impairing the

> obligations of [their] own contracts on par with other policy alternatives nor "impose a drastic impairment when an evident and more moderate course would serve its purposes equally well," nor act unreasonably "in light of the surrounding circumstances."

Id. (quoting United States Trust, 431 U.S. at 30-31) (citations omitted). To survive this test, according to Baltimore Teachers, the Board need show only some of the following: (1) the county was required to balance its budget; (2) a broad range of other budget-reduction measures were also taken; (3) the salary reduction was no greater than necessary to meet the anticipated shortfall; (4) the impairment was temporary and discontinued as soon as possible; (5) the impairment "did not alter pay-dependent benefits, overtime pay, hourly rates of pay, or the orientation of pay scales"; (6) the impairment was due to a "broad, generalized economic or social problem'; and (7) other county employees were subject to similar pay cuts. Id. at *6-7. In effect, Baltimore Teachers stands for the proposition that a county may impair contracts with impunity any time it

is forced to confront a budget crisis, as long as other measures are also considered and taken.[7]

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[7] While it is clear that the Contract Clause is "not to be read with literal exactness like a mathematical formula, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934), this Court would have thought that when faced with a choice between the potential impairment of a public contract and the potential reduction of discretionary public services, the Constitution would promote the sanctity of the contract and require that the services -- enjoyed by all -- be sacrificed. The Baltimore Teachers decision, however, rejects this view. Instead, the court reasoned:

> Public employees -- federal or state -- by definition serve the public interest. It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice.

1993 WL 345859, at *7. Had such a statement not come from such an esteemed body, this Court might have thought it somewhat disingenuous.

Of further concern to this Court is the obvious political expediency to the measures taken by the County and Board. As noted by the Supreme Court in United States Trust Co., "[a] government entity can always find a use for extra money, especially when taxes do not have to be raised." Id. at 26. Thus, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." Id. at 30-31. In this light, Judge Murnaghan's voice, although unheard by the Fourth Circuit, deserves

It is very likely that the Defendants will be able to make such a showing in this case.[8] The County's letter to the

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amplification:

> At most, [the pay reduction] minimized somewhat the political dissatisfaction of Baltimore voters which could be expected by City Council members if funding for cultural activities were reduced or taxes were raised. The pay reduction, though it clearly impaired the obligation of contract, could only benefit the political interest of City Council members who regularly must run for reelection. To avoid what politics would have rendered unpopular, Baltimore City chose to ignore, that is to break, contracts and thereby to interfere quite unfavorably with the bargained rights, namely the livelihood of important city workers, the police and public school teachers.

Baltimore Teacher Union v. Mayor of Baltimore, 1993 WL 406566 (4th Cir. 1993) (Murnaghan, J., dissenting).

[8] It would only be proper for the Court to grant summary judgment after the Plaintiffs were allowed to conduct some measure of discovery. See Fed. R. Civ. P. 12(b). Baltimore Teachers, however, would seem to make such discovery an exercise in futility, in the absence of an unlikely finding of evidence that the County or Board "had it in for" the teachers regardless of budgetary concerns. Although it appears that the County was not required by law to balance its budget -- a factor that seems to have weighed heavily in Baltimore City's favor, see Baltimore Teachers, 1993 WL 345859, at *6 & *8

Board, dated January 6, 1992, reveals some of the actions considered and taken by the County to address the budgetary problems:

> In response to the October reductions the County and the Board of Education reduced certain operating expenses, and we cancelled plans for the construction of the Berlin Health Center and raised liquor license fees. . . . We are looking at landfill tipping fees, a possible increase in the room tax, use of a portion of the County's remaining reserve, the sale of County surplus property, and additional operating expense reductions. . . . To achieve the $260,000 reductions for County departments, we are imposing nine days of unpaid furlough between now and June 30, 1992 [and] we are eliminating overtime payments and imposing a hiring freeze. We have chosen this method for County departments rather than instituting layoffs or establishing across-the-board salary reductions. . . . We recognize that funding for many non-essential areas will have to be carefully examined and reconsidered.

-- this Court cannot see how that single factor (or any group of factors) could be dispositive under the Fourth Circuit's broad standard.

(Compl., ex. B.)

The Plaintiffs attempt to distinguish their case from Baltimore Teachers -- demanding formal discovery and alleging that funds were available, the decision was made prematurely, and the County's revenue projections were erroneous -- but this Court's hands may be tied. It is very likely that to weigh the County's decision to impair the Contract (seemingly constitutionally protected) against a decision to "close its schools for a week," "reduce funding to the arts," or raise taxes (seemingly discretionary services or acts) would be, in the eyes of the Baltimore Teachers court, to sit as a "superlegislature." See 1993 WL 345859, at *8. That would be beyond the authority of this Court.

It is quite possible to read the decision in Baltimore Teachers to, as a practical matter, immunize the Board's actions here from effective judicial review. After all, it is a virtual certainty that the County will be able to show that it considered alternatives and made a reasonable (albeit

unpleasant) choice to reduce the Board's budget and/or the teachers' salaries paid by the Board. Similarly, the Board will be able to show that a reasonable choice among alternatives was made in applying the reduction of its budget to teachers' salaries rather than other items.

The Plaintiffs, however, have not had an adequate opportunity to engage in discovery to find evidence that might distinguish its situation from that of the parties in Baltimore Teachers. Accordingly, while the Court believes that discovery efforts in this regard are likely to be fruitless, the Court does not believe it can, or should, foreclose the effort. Therefore, the court -- while virtually certain of the substantive result in light of the Fourth Circuit's ruling -- cannot grant summary judgment until the Plaintiffs have had an opportunity to engage in a reasonable amount of discovery with regard to the "important public interest" aspect of the case.

B. The County

The County has moved to dismiss on the grounds that

(1) plaintiffs Shirley Moran ("Moran") and Maryland State Teachers Association ("MSTA") lack standing; (2) the furloughs did not impair the Contract; (3) Plaintiffs failed to exhaust statutory remedies; and (4) Plaintiffs failed to join a necessary party, the State of Maryland. For reasons stated above, and based on the discussion that follows, none of these grounds compel this Court to find dismissal appropriate at this time.

1. Standing

It is undisputed that WCTA has standing to bring the present suit. It is also undisputed, reviewing the Complaint, that Moran and the MSTA seek no additional or independent remedies, but merely duplicate the WCTA's requests on their own behalf. Thus, the Supreme Court's pronouncement in Doe v. Bolton, 410 U.S. 179 (1973), provides a first basis for rejecting the County's request for their dismissal. "[W]e need not pass upon the status of these additional [parties], for the issues are sufficiently and adequately presented by [the party

with clear standing], and nothing is gained or lost by the presence or absence of [the additional parties]." Id. at 189 (emphasis added).

More, however, can and should be said about the County's assertions. While the Complaint could have been more specific with respect to Moran's interest in this dispute, it is clear that as a teacher working in the County under the Contract she is a third party beneficiary to that agreement and therefore has standing. As Judge Raufman (sitting by designation) noted in Thomas v. Consolidation Coal Co., 380 F.2d 68, 82-83 (4th Cir.), cert. denied, 389 U.S. 1004 (1967), "[I]ndividual employees may bring suit upon a collective bargaining agreement in their own names as third party beneficiaries. ." See also Trustees of National Benefit Fund for Hos. & Health Care Employees v. Constant Care Health Ctr., Inc., 669 F.2d 213, 214 (4th Cir. 1982); Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., 144 A.2d 88, 90 (Md. 1958). The MSTA also claims, at least in the pleadings filed with

regard to this Motion, to be a third party beneficiary to the Contract. No purpose would be served by dismissing the MSTA from this dispute when, at the appropriate time, this Court would allow it to amend the Complaint to better reflect its alleged status.

2. Absence of Impairment

The second ground for dismissal has been adequately addressed -- and rejected -- above, in Part III.A.2. To reiterate, this Court cannot find, from any reasonable reading of Article XX of the Contract, that the agreement allowed the Board to unilaterally reduce teachers' compensation after the budgetwas initially approved. Rather, reading the two sections of Article XX together, it is apparent that the Contract became "valid and binding" when the Board raised no questions about funding within ten days of the budget enactment by the fiscal authority. To find otherwise would be to find an absence of mutual obligation, a concept the Supreme Court has twice disparaged. See United States Trust Co. v. New Jersey, 413

U.S. 1, 25 n.23 ("'A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" (quoting Murray v. Charleston, 96 U.S. 432, 435 (1878))). See also Baltimore City Lodge No. 3 Fraternal Order of Police v. Mayor of Baltimore, 801 F. Supp. 1506, 1509 (D.Md. 1992) ("By approving the bargained for levels of compensation, and enacting the Ordinance of Estimates into law, the City clearly imposed contractual duties on itself."), rev'd on other grounds, --- F.3d ---, 1993 WL 345859 (4th Cir. 1993).

3. Exhaustion of Remedies

As has been explained above, there was no contractual requirement to renegotiate under Article XX because funding was approved and objections were not timely filed. Nor was there any duty under Article XIV, the "Grievance Procedures" section, because the Plaintiffs' allegations do not "aris[e] out of or in any way involv[e] interpretation or application of the terms of [the Contract]," but rather claim a violation of the Constitution of the United States. The same holds true with

regard to Section 6-511 of the Education Article of the Maryland Code, the statutory counterpart to Article XX. Md. Code Ann., Educ. § 6-511 (1992). And because there was no duty to renegotiate, there was neither a good faith obligation nor an impasse under Section 6-510. Id. §§ 6-511(a) & (d). Furthermore, exhaustion of state administrative remedies is not required in actions brought under 42 U.S.C. S 1983 (1981). See Patsy v. Board of Regents, 457 U.S. 496, 516 (1982); Earle v. Gunnell, 554 A.2d 1256, 1258 (Md. App. 1989).

4. Absence of Necessary Party

The County seeks dismissal based on the absence of a necessary party -- the State of Maryland. However, complete relief surely can be accorded without the State's presence as a party to this litigation. The State has not claimed an interest in the subject of the pending matter and there has been no reasonable showing that the disposition of this action will impede the State's interests or subject any current party or the State to multiple or inconsistent obligations. See Fed. R. Civ.

The County's assertion that the State has an interest in upholding the integrity of its legislative enactments," and is therefore a necessary party, is one that the Court has heretofore not encountered. If a valid proposition, the State would be a necessary party to every case in which the validity, and possibly even the interpretation, of a State law was at issue. It suffices to note that the Court does not go along with this apparently novel idea.

5. Discretionary Action

Based on the recently decided Bockes case, the County asserts a new grounds for dismissal -- that it cannot be held liable for the discretionary actions of the Board. See Bockes, 999 F.2d at 791. At least two items of evidence must be noted: (1) the January 6, 1992, letter from the County to the Board stating that "it would be necessary for the Board of Education to reduce salary expenditures by $740,000" while hinting (in the same paragraph) that a furlough system be imposed and (2)

the Plaintiffs' assertion at the hearing that the only way to so reduce salary expenditures was to furlough teachers. By no means can it be said that the Plaintiffs cannot possibly prevail on this issue.

IV. STAY PENDING SUPREME COURT ACTION

For the foregoing reasons, the Court is keeping this case alive for the present. However, it is clear to this Court -- and quite likely to all parties -- that as long as Baltimore Teachers remains the law in the Fourth Circuit, further action in this case is likely to be an exercise in futility.

The Plaintiffs, of course, disagree with the decision in Baltimore Teachers. Moreover, it is fair to say that this Court -- giving all due respect to the United States Court of Appeals for the Fourth Circuit -- believes that the Supreme Court should grant a writ of certiorari in that case and issue a definitive decision different from that reached by the Fourth Circuit. Nevertheless, as matters now stand, this Court must follow the Baltimore Teachers decision.

Plaintiffs have asked this Court to stay the instant case pending Supreme Court action in regard to Baltimore Teachers. A stay would avoid the necessity of possibly needless expense for all parties in undertaking discovery at present.[9] The Court does not understand the Defendants to oppose a stay at this time. Accordingly, a stay will be granted and the case will be administratively closed subject to reopening by virtue of the Supreme Court's resolution of Baltimore Teachers or for any other good cause.

It should be noted that, during the stay, the parties may -- and are encouraged to -- engage in arbitration or administrative proceedings to seek to resolve their dispute. The Court will consider a request for an extension of the stay for this purpose.

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[9] A modification of the law as pronounced in Baltimore Teachers might enable the Plaintiffs to focus their discovery upon different standards. The absence of any modification may lead Plaintiffs to forego further discovery, take an adverse judgment, and appeal this Court's decision.

V. CONCLUSION

For the foregoing reasons:

1. Defendant Board of Education of Worcester County's Motion to Dismiss, or Alternatively, for Summary Judgment is DENIED, without prejudice to renewal following discovery.

2. The Motion to Dismiss of Defendant Worcester County is DENIED.

3. A separate Order shall issue to STAY and Administratively CLOSE this case.

SO ORDERED this 17th day of November, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

(2) (2)

Supreme Court, U.S.
FILED
JAN 27 1994
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Nos. 93-1078 and 93-1173

In The

Supreme Court of the United States

October Term, 1993

BALTIMORE TEACHERS UNION, AMERICAN FEDERATION OF TEACHERS LOCAL 340, AFL-CIO, et al.,

v. *Petitioners,*

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

Respondents.

BALTIMORE CITY LODGE NO. 3 OF THE FRATERNAL ORDER OF POLICE,

v. *Petitioner,*

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT AND CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHEN A COLLECTIVELY BARGAINED LABOR CONTRACT BETWEEN A MUNICIPALITY AND ITS EMPLOYEES IS EXPRESSLY AND IMPLIEDLY SUBJECT TO LAW EXISTING AT THE TIME OF ITS EXECUTION – INCLUDING (1) AUTHORIZATION IN THE MUNICIPALITY'S CHARTER TO REDUCE APPROPRIATIONS TO BALANCE ITS BUDGET, AND (2) A STATE BUDGET RECONCILIATION LAW AUTHORIZING THE MUNICIPALITY TO REDUCE PREVIOUSLY APPROVED APPROPRIATIONS IN LIGHT OF BUDGET SHORTFALLS OCCASIONED BY REDUCTIONS IN STATE AID – DOES A FURLOUGH, AMOUNTING TO A REDUCTION OF THE EMPLOYEES' BARGAINED FOR ANNUAL INCOME BY LESS THAN ONE PERCENT, IMPLEMENTED IN RESPONSE TO DRASTIC CUTS IN STATE AID CAUSING THE MUNICIPALITY TO SUFFER A BUDGET DEFICIT, CONSTITUTE AN "IMPAIRMENT" OF THE MUNICIPALITY'S CONTRACTUAL OBLIGATION WITHIN THE MEANING OF THE CONTRACT CLAUSE, U.S. CONST. ART. I, § 10, CL.1?

II. IS A "SUBSTANTIAL" IMPAIRMENT OF A CONTRACTUAL RELATIONSHIP OCCASIONED BY A FURLOUGH OF MUNICIPAL EMPLOYEES WHICH RESULTS IN A LOSS OF .95% OF THE EMPLOYEES' BARGAINED FOR GROSS ANNUAL SALARY, WHEN THE FURLOUGH IS IMPLEMENTED TO BALANCE THE MUNICIPALITY'S BUDGET IN LIGHT OF DRASTIC AND UNEXPECTED REDUCTIONS IN STATE AID?

III. DOES THE CONTRACT CLAUSE EVER PERMIT A LOCAL GOVERNMENT TO SUBSTANTIALLY IMPAIR A LABOR CONTRACT WITH ITS OWN EMPLOYEES?

LIST OF PARTIES TO THE PROCEEDING

NO. 93-1078

Petitioners are the Baltimore Teachers Union and the City Union of Baltimore. Respondents are the Mayor and City Council of Baltimore ("Baltimore City" or "the City"), a municipality, the members of the City's Board of Estimates (Kurt L. Schmoke, Mary Pat Clarke, Jacqueline F. McLean, Neal M. Janey and George F. Balog), the Board of Estimates of Baltimore City, and the State of Maryland.[1]

NO. 93-1173

Petitioner is Baltimore City Lodge No. 3 of the Fraternal Order of Police. Respondent is the City of Baltimore.

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[1] The State of Maryland sought to intervene in the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 2403(B), but its motion to intervene was denied by the district court. The State appealed such denial to the Court of Appeals for the Fourth Circuit, which declined, on the grounds of mootness, to review the district court's denial of the State's motion to intervene. With regard to the State's appeal the court of appeals stated: "Our disposition of this case renders moot, however, the State of Maryland's appeal from the district court's denial of its motion for leave to intervene, and accordingly, we decline to review that ruling." See App. 57-58, n. 14, to Petition for Certiorari in No. 93-1078. (App. ___ references are to the appendix to the Petition for Certiorari in No. 93-1078). If this Court determines that the State of Maryland is not properly a party for purposes of Supreme Court Rule 12.4, then the State of Maryland respectfully requests that the State's participation in this Brief in Opposition be treated as a brief of an *amicus curiae*.

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MISCELLANEOUS:

Frankfurter, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577 (1938) 8

REASONS FOR DENYING THE WRIT

I

Relying on a purported conflict between the decision below and decisions of the Second Circuit and several state courts of last resort, and relying further on a purported lack of clarity emanating from the decisions of the Supreme Court, petitioners ask this Court to grant certiorari and decide under what circumstances a furlough[1] of municipal employees which constitutes a substantial impairment of their contract with the municipality is sufficiently "reasonable and necessary" to satisfy the Constitution's prohibition against governmental impairment of the obligation of contracts. U.S. Const., Art. 1, § 10, cl. 1. Petitioners ask this Court to explain what it meant when it held that "*complete* deference to a legislative assessment of reasonableness and necessity is not appropriate [in cases involving modification of a State's own financial obligations] because the State's self-interest is at stake." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) (emphasis added).[2]

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[1] The furlough referred to in this case consisted of a reduction of annual gross salary by 0.95%. The City withheld one-half day's pay per two-week pay period for five successive pay periods. Pay scales, the step movement process, hourly rates of pay and overtime pay were not affected. Moreover, there was no change in any benefit the level of which depended on rate of pay or salary scale.

[2] The cases giving rise to the petitions were filed separately but disposed of by the same order of the district court. App. 21. Appeals in both cases were consolidated in the court of appeals. App. 23. In substance both petitions present for review the same question arising under the Contract Clause.

The writ should be denied. The Court is not likely to reach petitioners' questions because there are other meritorious arguments supporting the decision below without regard to the questions sought to be raised by petitioners. *Sanson Hosiery Mills v. National Labor Relations Board,* 344 U.S. 863 (1952). Before the "reasonableness and necessity" of governmental action will be examined under the Contract Clause there must be an "impairment" of a contract. *General Motors v. Romein,* ___ U.S. ___, 112 S. Ct. 1105, 1109 (1993). In this case the furlough did not constitute an "impairment" of the contract between Baltimore City and its employees, because the City's action was authorized by a City Charter provision and a state statute, as set out by Judge Widener in his concurring opinion. As Judge Widener stated, "Because I believe that the terms of the Memoranda of Understanding between the City and the police unions and the terms of the collective bargaining agreements between the City and the teachers' unions necessarily included the statutory and charter authorization for the Board of Estimates' actions, . . . I do not believe there was any impairment of the contract." App. 59. (Opinion of Widener, J., concurring).[3]

Even if the questions presented by petitioners would be reached by the Court on either of these records, certiorari should be denied. There is no real conflict between the decision below and the cases petitioners rely upon to demonstrate a conflict. (See *infra,* 5). To the extent the cases cited by petitioners involve the Contract Clause, they, like the decision of the court below, follow *United*

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[3] See respondents' first question presented, *supra,* at i.

States Trust in acknowledging that *some* deference is owed to the legislative assessment of the reasonableness and necessity of an impairment of a government's own contract; the different results are explainable on the basis of the peculiar facts and circumstances of each case, not because different legal standards were employed. This case, therefore, does not involve a question of constitutional law that has not already been decided by the Supreme Court, or about which the lower courts are split.

Certiorari should be denied, additionally, because it is not appropriate now. The questions posed in the petitions are not ripe for review. Although the economic doldrums of the early 1990's produced a handful of public employee furlough cases decided under the Contract Clause, the economy has recovered sufficiently to make it unlikely that the circumstances giving rise to the emergency furlough in the instant case are now being repeated on a significant basis across the Nation; and petitioners cite only one pending case involving the alleged impairment of a collectively bargained governmental contract. With the paucity of cases which have been and reasonably may be expected in the future to be decided involving the issue presented in the petitions, discretionary review by the Supreme Court is not warranted. *Cf., Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965) (certiorari granted because of a conflict and the fact that "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues"); *Linkletter v. Walker*, 381 U.S. 618, 620 (1965) (certiorari granted because of a conflict over "what has become a most troublesome question in the administration of justice"). Similarly, before this Court enters into the thicket

of determining when public employee furloughs are "reasonable and necessary" in light of a fiscal crisis, it should have the benefit of "further study" of the issue by the lower courts. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Opinion of Stevens, J., respecting denial of certiorari).

Discretionary review by the Supreme Court should also be denied because the decision of the lower court was correct and fair. As observed by the lower court, Baltimore City took what were needed and measured steps to absorb extraordinary reductions in revenue. The City resorted to a furlough to balance its budget and avoid further layoffs only *after* it tried layoffs, job abolishments and early retirements. Thus, the lower court correctly held that the City did not consider salary reductions on a par with other policy choices. *See United States Trust*, 431 U.S. at 29-31. As required by *United States Trust*, the City tailored the furlough plan as narrowly as possible to meet unforeseen shortfalls in revenue. The amount of the pay reduction, less than 1% of petitioners' gross annual pay, was no greater than that necessary to meet the anticipated shortfall. The plan did not alter pay-dependent benefits, overtime pay, hourly rates of pay, or the orientation of pay scales.[4] Unlike the special interest character of the legislation struck down in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) the City's plan did not narrowly target specific classes of

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[4] Respondents assert that any impairment which occurred in this case was not substantial enough to be of constitutional magnitude. See respondents' second question presented, *supra*, at i.

employees; it extended to all City employees. And the plan, which was discontinued at the first opportunity, "affect[ed] simply a temporary alteration of the contractual relationships of those within its coverage." *Spannaus*, 438 U.S. at 250.

II

The decision below is not in conflict with any other case. Petitioners cite several cases which they assert are in "direct conflict" with the Fourth Circuit's holding, but all of those cases are distinguishable on the facts or the law, or both. Indeed, the analytical framework adopted in the decisions petitioners cite is consistent with that employed by the court below.

In *Association of Surrogates v. State of New York*, 940 F.2d 766 (2nd Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 936 (1992) (*"Surrogates"*), upon which petitioners principally rely, the Second Circuit considered whether New York violated the Contract Clause when it sought to solve a budget crunch and finance an expansion of its court system by deferring the wages of certain court employees contrary to their collective bargaining agreements. Scrutinizing New York's "lag-payroll" plan in light of *United States Trust*, the court concluded that the plan "smack[ed] of political expediency." 940 F.2d at 773.

> [B]y placing the costs of improvements to the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state, [the New York legislature and Governor] ruffle only a few feathers and fight the "exploding drug crisis." . . . But the only people paying for the new courts are the

> few employees of the judicial branch who are subjected to the lag payroll. The Contract Clause bars such expedient *post hoc* changes in contractual obligations. [*Id.*]

The decision below is not to the contrary. Indeed, in the course of examining the *measured steps* Baltimore City took in response to extraordinary reductions in state revenue, the Fourth Circuit distinguished *Surrogates* factually.

> The City's obvious reluctance to resort to the plan and its decision to do so only when it concluded that it had no better alternative belies the "political expediency" suspected in *Surrogates*, 940 F.2d at 773, and confirms that the City did not consider salary reductions on a par with other policy choices, *see United States Trust*, 431 U.S. at 29-31. [App. 50 (6 F.3d at 1020)]

In *Surrogates* the state "plac[ed] the costs of improvements of the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state," 940 F.2d at 773; but in the instant case, "unlike the special interest character of the legislation at issue in *Spannaus*, Baltimore's plan did not narrowly target specific classes of employees; it extended to all City employees." App. 53 [6 F.3d at 1021].

The Fourth Circuit cited *Surrogates* without criticism,[5] and distinguished it on the facts. Viewed from the

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[5] In rejecting the argument of respondents that any impairment of contract in the instant case was not "substantial" enough to be constitutionally significant the Fourth Circuit expressly *followed Surrogates*. See App. 42, n. 8 [6 F.3d at 1018, n. 8]

standpoint of the legal and analytical framework applied, however, the cases are in harmony. Nevertheless, petitioners compare *dicta* in the two cases and conclude they are in "direct conflict."

In *Surrogates* the Court stated in *dicta*:

> Indeed, it would be inconsistent for us to accept the defendants' argument that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crises that the lag payroll would create. [940 F.2d at 772]

Petitioners contrast such *dicta* with that of the court below:

> [T]he plan affected reliance interests not wholly unlike those of private entities in regulated industries, which contract subject to future, additional regulation. [citations omitted] Public employees – federal or state – by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest. It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice. [App. 54 (6 F.3d at 1021)]

Irrespective of whether the *dicta* of the Second and Fourth Circuits show an inconsistency, it cannot be said that the cases evidence a real conflict on the same subject matter of law or fact. Since the cases do not involve a "head-on collision," rather than adjusting any conflict now, it would be a wise exercise of discretion to allow the issue to receive fuller study before it is addressed by the Supreme Court. See *McCray v. New York*, 461 U.S. 961, 963

(1983) (Opinion of Stevens, J., respecting denial of certiorari). See also Frankfurter, *The Business of the Supreme Court at the October Terms, 1935 and 1936,* 51 Harv. L. Rev. 577, 596-97 (1938).[6]

AFSCME/Iowa Counsel 61 v. Iowa, 484 N.W. 2d 390 (Iowa 1992) and *Chiles v. United Faculty of Florida,* 615 So. 2d 671 (Fla. 1993) are distinguishable on the law. *AFSCME* arose from a binding contract arbitration award which establish a pay increase for state employees. The arbitration process had been established by statute. The Supreme Court of Iowa held that the state was required to fund the pay increases, but the court did not have occasion to decide any issue under the Contract Clause of the United States Constitution. Accordingly, *AFSCME,* which did not cite *United States Trust* or any other Contract Clause case decided by this Court, is distinguishable on the law. Similarly, *Chiles* was decided under Article I, § 10 of the Florida Constitution, and did not involve a claim based on the Contract Clause of the Federal Constitution.

Carlstrom v. Washington, 694 P.2d 1 (Wash. 1985) and *Kestler v. North Carolina Local Government Employees'*

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[6] *Condell v. Bress,* 982 F.2d 415 (2nd Cir. 1993), cert. denied, ___ U.S. ___, 113 S.Ct. 1849 (1993), *Association of Surrogates and Supreme Court Reporters v. State of New York,* 577 N.E. 2d 10 (N. Y. 1991), and *Association of Surrogates and Supreme Court Reporters v. State of New York,* 588 N.E. 2d 51 (N.Y. 1992) emanated from the same "lag payroll" scheme invalidated by the Second Circuit in *Surrogates.* Petitioners assert these cases are in conflict with the decision below. The cases are factually distinguishable from the instant case, for reasons similar to those are already explained with regard to the Second Circuit decision in *Surrogates.* They do not establish a real conflict on the same subject matter of law or fact and do not, any more than *Surrogates,* support issuance of the writ of certiorari.

Retirement System, 808 F. Supp. 1220 (W.D.N.C. 1992) are distinguishable on the facts. In *Carlstrom* the state, in response to a fiscal emergency, failed to implement a salary increase provided for in a collective bargaining agreement. The court found the impairment unreasonable and unnecessary because the economic emergency was both expected and foreseen. In the instant case by contrast, the drastic reduction in state financial aid to Baltimore City, which occurred well into the fiscal year, was unforeseen by the City and created an emergency it was powerless to avert.

Kestler is inapposite because it does not involve a contract impairment in response to a fiscal emergency. A disabled former police officer challenged the constitutionality of the imposition of an earnings cap which would reduce his vested disability pension benefits. The earnings cap, which was enacted to correct inequities in the pension system, became effective after the plaintiff's benefits had vested, and could not be applied retroactively to him. The issues raised in *Kestler* are remote from those in the instant case.

The last case petitioners rely upon as allegedly in conflict with the decision below is *Opinion of the Justices*, 609 A.2d 1204 (N.H. 1992), where the court advised the state legislature that a bill requiring certain state employees to take unpaid leave would violate the Contract Clause. The court found the measure an act of mere political expediency since the state made no effort to reduce non-contractual services before impairing contracts with its employees. The planned furlough was struck down under *United States Trust*. By contrast, in the instant case the City resorted to a furlough only after it tried layoffs, job abolishments and early retirements,

leading the court below to observe that "[t]he City's obvious reluctance to resort to the plan and its decision to do so only when it concluded that it had no better alternative belies the [conclusion that the City's motivation was] "political expediency." App. 50.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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